Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

In Re Eugene E. Klecan and Donald Schauerte in Behalf of Themselves and the Unborn in the State of New Mexico and the Taxpayers of the State of New Mexico,

EUGENE E. KLECAN AND DONALD SCHAUERTE,

Petitioners,

v.

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; AND LEWIS H. KOPLIK, M.D.,

Respondents.

Petition For Extraordinary Writ To The Supreme Court Of The State Of New Mexico

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

The issues "we" are bringing before the Court is:

1. *Does the judicial system, State and Federal, spare the lives of the unborn in the State of New Mexico?* ANS: NO, but there is an IF. The answer is NO, IF the mother wants not to spare the life of her unborn child. What is the basis for her protected decision not to spare the life of her unborn child? ANS: *Roe v. Wade,* 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973).

2. *Does Roe v. Wade, supra, enforced by Doe v. Bolton, 412 U.S. 925, 37 L.Ed.2d 153, 93 S.Ct. 739 (1973), decide anything about the kind of abortion that a pregnant woman may choose?* ANS: NO. The only requisite is her free will choice.

3. *Is there anything in New Mexico laws or decisions that dispute Roe v. Wade, supra*? ANS: NO. In 1973, one month after *Roe v. Wade,* supra, the New Mexico Court of Appeals released a doctor convicted of violating the criminal law of New Mexico strictly because of the Supremacy doctrine applied through *Roe v. Wade,* supra. That case is *State v. Dr. Strance,* 84 N.M. 670, 506 P.2d 1217 (1973).

4. *Did the Dr. Strance case supra say that Dr. Strance was released because of the protection afforded by Roe v. Wade, supra, decided in the previous month*? ANS: YES.

5. *Did the Strance case supra have a dissent*? ANS: YES. *Did the Strance case say that Dr. Strance should not be released?* ANS: NO, it said that New Mexico should not have a law which would make abortions based on the mother's free

QUESTIONS PRESENTED FOR REVIEW – Continued

will decision a crime for the doctor performing the abortion. *Did the majority in Strance, supra, agree with J. Sutton's dissent?* ANS: NO, that is why J. Sutton's dissent was a dissent.

6. *What does the Strance decision supra have to do with the present case which started in New Mexico?* ANS: *Strance,* supra, in New Mexico, means two things. First, that New Mexicans apply *Roe v. Wade,* supra, as to non-enforceability of *our* laws to the contrary. And secondly, New Mexicans speaking through the majority opinion do not wipe out, annul, or repeal New Mexico anti-abortion laws, which is what the J. Sutin dissent said should be done.

7. *What is the result of Strance, supra, to this very day?* ANS: It means that New Mexico applies *Roe,* supra, but does not agree with the philosophy behind it.

8. *Are there any known occasions where Roe v. Wade has not been applied in New Mexico?* ANS: NO.

9. *Does New Mexico majority opinion in Strance, supra, have a legal name?* ANS: Yes, the public policy of the state of New Mexico.

10. *Do other states agree with the dissent in Strance, supra?* ANS: Some do and some don't. Montana passed a state law which established a woman's "right of privacy" but New Mexico has never done so.

12. *Does the Strance case supra and its "Public Policy" have anything to do with the present Petition on appeal from the*

QUESTIONS PRESENTED FOR REVIEW – Continued

New Mexico Supreme Court? ANS: Because the Public Policy of New Mexico as distinguished from, say, Montana, forms the background for the present case, which is not one by a pregnant woman but by four abortionist doctors and three national abortion-seeking organizations. Jane Roe, of *Roe v. Wade*, allegedly was a pregnant woman.

13. *Does the present New Mexico case now coming into the U.S. Supreme Court have a pregnant woman Plaintiff*? ANS: It, therefore has nothing to do with the protected "free will" choice of a pregnant woman.

14. *Do the four abortionist doctors who are Plaintiffs below, in Santa Fe County District Court case SF 95-867C, claim that their rights to provide abortions and to receive payment has been interfered with?* Their complaint says so. Their complaint is set out fully in Appendix ___. *Does the complaint name any pregnant woman or claim that a pregnant, yet unnamed, woman is being denied an abortion?* ANS: There are no such allegations. *Is that different from Roe v. Wade, supra?* ANS: Yes.

15. *Is a pregnant woman Plaintiff, like in Roe v. Wade, necessary*? ANS: We think so.

16. *Did you raise that objection in this case*? ANS: YES, on many occasions, the first of which was in our Pleading entitled, "RESPONSIVE PLEADING TO THE COMPLAINT," filed 6 days after the case was filed and presented in open court the following day, April 27, 1995. We raised the issue and asked for a dismissal then and there, which was denied. This "Responsive Pleading to the

QUESTIONS PRESENTED FOR REVIEW – Continued

Complaint" was also raised in the New Mexico Supreme Court in our Petition for Prohibition there which is the case on appeal in this Court. That pleading is in Appendix 31, together with our Motion to Intervene, which latter Motion was granted and even after we were described as Defendants in Intervention.

18. *Is that Denial a claim of error that you are bringing to this Court wherein you are asking for an Extraordinary Writ and Stay*? ANS: YES; we are and claim that the case here should dismiss the adverse decisions against us.

19. *Is there any legal reason why such procedural rulings and a failure to dismiss at the very outset of this case is not applicable in an abortion case*? ANS: We know of no exception to the right of the Intervenors, acting for the unborn and the taxpayers of New Mexico, to be deprived of the right of procedural "due process" merely because one of the facts and the principle objective of the Plaintiffs, is a claim to be paid for their services performing abortions.

20. *Does the fact the Plaintiffs claim large constitutional issues in their complaint alter our rights to a "due process" trial*? ANS: NO.

21. *What is the right asserted for the unborn and the taxpayers in this litigation*? ANS: The right to life, the right of freedom to be born, the right of taxpayers not to have their property taken away by taxation without due process of law.

22. *What do you say about the U.S. Supreme Court Singleton v. Wulf, which seems to say under the facts of that case that a*

QUESTIONS PRESENTED FOR REVIEW – Continued

Jane Roe, personally, need not be a Plaintiff? ANS: The Singleton case was a case under *Roe v. Wade*, which means that the rights of any woman to an abortion-on-demand applied. That is not so in this case, since Plaintiffs case would require the taxpayers of New Mexico to pay for the abortion services before and after the abortion. Furthermore, the Plaintiffs case here applies only to pregnant women below the poverty line. There is another reason; the only Plaintiffs herein are the four leading abortionist doctors in the state who allege that they are losing money. We would add another almost unspeakable distinction from *Singleton v. Wulf*, 428 U.S. 106, in that these four Plaintiff abortionist doctors performed 153 of the 155 abortions that took place under the Heim Resolution from December 1, 1994 until May 5, 1995, and are still going on. We also submit that the Public Policy of the state of New Mexico, being anti-abortion, but obedient to *Roe v. Wade's* enforceability, would find the present Plaintiffs array as described above, to be opposed to that Public Policy. We made this fact known both in the trial court in Santa Fe and in our Writ of Prohibition in the New Mexico Supreme Court. It was denied in both cases. We raise this as an error and base it upon federal and state constitutional provisions requiring due process to every litigant, Fourteenth Amendment U.S. Const. Article II, Sec. 18 N.M. Const.

23. *Does the record in this case show that the four abortionist, Plaintiff's doctors, actually received state funds for performing the 153 abortions?* ANS: Yes to does, on records

QUESTIONS PRESENTED FOR REVIEW – Continued

furnished, from the Human Services Department via discovery procedures. The specific instance in the trial court where Petitioners herein raised the question of improper Plaintiffs and the omission of necessary Plaintiffs, appears on App. 21.

Will the United States Supreme Court stop the continuation of New Mexico's Human Services Department Resolution, hereinafter referred to as the Heim Resolution, which became effective Dec. 1, 1994 and which is continuing in effect currently because of a Permanent Injunction by J. Herrera of the Santa Fe District Court App. 30, relief from which was denied by the New Mexico Supreme Court June 21, 1995? App. 29.

Does the Heim Resolution and the abortions resulting therefrom for medically necessary reasons for pregnant women below the poverty line and entirely funded by State of New Mexico taxes, comply with "normal processes of democracy" contained in a footnote in *Beal v. Doe*, 97 S.Ct. 2366, 2373 which was cited also in a footnote in *Harris v. McRae*, 65 L.Ed.2d 800 with approval, which footnote in *Beal*, supra, also added, "They should be decided by the representative of the people, not by the Court." *Beal*, supra, 97 S.Ct. 2373 App. 50 contains pg. 2373 of *Beal* and pg. 800 of *Harris*, supra, Democracy would not be democracy if the Chief Executive could legislate for the death by abortion of the unborn in the State of New Mexico. In *Harris*, supra, the United States Supreme Court decided against the pro-abortion decision and we assert that it is exactly the position rejected in *Harris*, supra, which is being renewed here. If the New

QUESTIONS PRESENTED FOR REVIEW – Continued

Mexico Legislature had acted, we would have seen what the notes in *Beal*, supra, and *Harris*, supra, meant. Instead we have *Harris* relitigated in the Plaintiffs' Complaint.

We assert Federal Supremacy is challenged by this Complaint. A paragraph by paragraph comparison of Plaintiffs' Complaint with the issues decided in *Harris*, supra, show no essential difference. App. 1. Asking for relief based on the State Constitution is not a new case. Both of those cases supra said "democracy" must be observed, *not* autocracy. New Mexico's Constitution or Separation of Powers Art. III Sec. 1 not only provides for a system of Legislative, Executive and Judicial separate branches but *expressly* prohibits one branch from encroaching upon another. Being a New Mexican, it is incredible that an autocratic violation of Art. III which has resulted in so many more deaths than the 155 up to May 5, 1995 has gotten this far. This is the first case we are aware of where the unborn and the taxpayers are actually represented. The Order allowing Intervention shows that it was an Intervention of Right pursuant to New Mexico law App. 51. That we represented the "unborn" and the "taxpayers" appear in the Motion to Intervene. App. 17.

Does the United States Constitution, Art. IV, Sec. 4, "Republican Form of Government" require or allow the federal government, acting through the United States Supreme Court, to stop abortions authorized by the Heim Resolution?

Is New Mexico state funding and participation in the abortion process by the state in violation of the state

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JURISDICTION

Re: Constitution – State and Federal, Legislative Acts – State and Federal Judicial Decisions – State and Federal, Judicial Procedures – State and Federal

Compact Between Federal Government and New Mexico As Applied to this Petition in the Supreme Court of the United States, Procedurally Pursuant to 28 U.S.C. § 1257(1)(2)(3) but Procedurally Authorized Herein by 28 U.S.C. § 1651(A) as Applied by Rule 20 Making this a Petition for an Extraordinary Writ

Jurisdiction is asserted in the U.S. Supreme Court as part of the Appellate Jurisdiction of the U.S. Supreme Court, under 28 U.S.C. § 1651(A), which establishes the *right* of Petitioners herein for themselves and in behalf of the "unborn" and "taxpayers" of the state of New Mexico for themselves for an extraordinary writ. 28 U.S.C. § 1257 is a normal request for certiorari. Section 1651(A) herein invoked proceeds from the same Appellate procedure to the highest state court of New Mexico but is based upon emergency reasons called for by the New Mexico Supreme Court's denials of a stay and any relief from injunctions that are operative in New Mexico regarding abortions and funding of same solely by New Mexico taxpayers. The New Mexico Supreme Court denial of an original proceeding by the Petitioners herein pursuant to the N.M. original, exclusive jurisdiction pursuant to Art. VI, § 3, N.M. Const. Vol. 1, N.M.S.A. 1978, pg. 177, was from a State District Court of New Mexico in Santa Fe County Cause No. SF 95-867C, which decreed a Temporary Injunction on May 1, 1995 and a Permanent Injunction from the bench on June 5, 1995.

Fisher v. District Court of Montana, 424 U.S. 382, 57 L.Ed.2d 106, 96 S.Ct. 943 (1976) is authority for jurisdiction being in this Court and the Supreme Court of the State of Montana, which also holds that Writ of Supervisory Control by Montana Supreme Court is final judgment within the meaning of 28 U.S.C. § 1257(3). Also, *Gurner v. Oman,* 459 F. Supp. 436, a New Mexico United States District Court Case by J. Bratton, holding that review of New Mexico Supreme Court is only to U.S. Supreme Court.

Petitioners herein applied to the Supreme Court of New Mexico under Article VI, § 3 N.M. Const. both following the Temporary Injunction and the Permanent Injunction, both of the above being independent actions designed to stop abortions allowed by the injunctions; the first being Cause No. 22886 to which a supplement was filed May 8, 1995 specifically requesting a Stay of the Temporary Injunction entered below on May 1, 1995. The Supreme Court denied the Petition by the same Petitioners herein and also expressly denied the supplementary request for a Stay. Following the issuance of the Permanent Injunction from the trial bench, Petitioners herein filed a separate Petition for Prohibition and also asking for a Stay and invoking the superintending powers of the New Mexico Supreme Court pursuant to Art. VI, § 3 of the N.M. Const. in Cause No. 22988. That Petition was denied without opinion June 21, 1995, App. 29.

The denial of June 21, 1995, leaves intact a ruling by the lower New Mexico Court granting the Plaintiffs' Complaint by declaring that the Dansfelser Resolution is unconstitutional in violation of several New Mexico state constitutional provisions.

STATEMENT OF THE CASE

This case is one in which a 1994 State of New Mexico Executive Department through the Human Services Department, issued a Resolution, App. 52, on November 28, 1994, to become effective on December 1, 1994. This Resolution changed the entire scope of New Mexico's Medicare plan in that it provided for abortions at taxpayers' expense for medically necessary reasons for those women below the poverty line. The Executive in 1994, that is the Governor, had lost the November election and the Resolution effective December 1, 1994, will be referred to by the name of his Secretary for the Human Services Department, Dick Heim. It was a lameduck Resolution. The December 1st Resolution by altering abortions aforesaid, drastically changed the Medicare program in New Mexico which up until December 1, 1994 had corresponded completely with the Hyde Amendment and the federal government's program on Title XIX of the Social Security Act. Petitioners were Defendants in Intervention in the case started in the District Court of Santa Fe County and were expressly delegated by an Order allowing their Intervention to represent the unborn and the taxpayers of New Mexico. App. 51. This Stay is predicated on the reality of 155 abortions since December 1, 1994 until May 5, 1995 and is continuing. These abortions invaded the group that Petitioners represented, namely the unborn, and because these abortions were allowed to continue by an injunction of the lower court in Santa Fe County, the threat of abortion to the entire class represented by the Petitioners continues to this very date. In addition, the abortions performed pursuant to the December 1, 1994 Heim Resolution were actually paid for from State funds even though no act of the legislature

had ever authorized the abortions or the payment of the same. If a Stay is not granted, both the above effects, that is abortions and state tax funding, will continue.

The Four Plaintiff Doctors Performed 153 Of The 155 Abortions Pursuant To The December 1, 1994, Resolution

The above figures were forced from the HSD by Motion of Intervenors. The Temporary Injunction was entered on May 1, 1995, the date the Danfelser Resolution would have gone into effect, but which the Temporary Injunction declared to be unconstitutional. On May 10, 1995, Petitioners on behalf of the unborn and the taxpayers of New Mexico filed in the Supreme Court of New Mexico a Petition under Art. VI, § 3, of the New Mexico Constitution, asking that the Supreme Court exercise its Superintending Control and to void the Temporary Injunction on various grounds including lack of standing on the part of all Plaintiffs below to bring an action which will allow abortions at taxpayers' expense for medical reasons and wherein no pregnant woman was a Plaintiff, the same being contrary to *Roe v. Wade*, supra, and *Harris v. McRae*, supra. There were other grounds including deprivation of due process rights and, in particular, that the "life" of the unborn was being taken and would be taken without due process of law. The Supreme Court of New Mexico denied this Petition and also denied an accompanied Petition by Intervenors to "stay" the Temporary Injunction by the court below which was the enforceability clause of the Temporary Injunction because it continued in effect the December 1, 1994, Resolution which allowed at taxpayers' expense the 155 abortions

that had occurred as a result of the December 1 Resolution. The Petition in the Supreme Court of New Mexico and the request for a "stay" were denied. Following the June 5, 1995 Decree which made the Injunction permanent, thereby barring the May 1, 1995 Resolution, the Petitioners herein, on behalf of the unborn, filed a Petition for Prohibition in the New Mexico Supreme Court. The Petition requests a "stay" of the proceedings below as a protection of the unborn *en ventre sa mere* from being aborted, App. 31. That Petition containing a request for a "stay" was denied on June 21, 1995, App. 29.

Lack of jurisdiction, raised throughout, establishes a violation of the Fourteenth Amendment, protecting the life of the unborn, and constitutes a basis for federal intervention in this lawsuit. The basis for the complaint by the four abortionist doctors who received state funds for their one hundred and fifty-three (153) abortions performed since December 1, 1994, was the result of *Harris v. McRae*, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671. In their successful attempt in New Mexico to enlarge the interpretation of New Mexico's "equal protection of the laws", the Plaintiffs overlooked and violated the protection given to the unborn and to taxpayers.

At the hearing on the permanent injunction, which occurred on June 5, 1995, the temporary injunction was made permanent from the bench. The injunction restrained the enforcement of the Danfelser Resolution, which would have become effective on May 1, 1995 the application of which the temporary injunction prevented. The declared unconstitutionality of the Danfelser Resolution made effective the Heim Resolution which had become effective on December 1, 1994, and the execution of which resulted in the deprivation of life of 155 of the

unborn. This is the on-going situation, which makes this Petition *life or death* for the unborn *en ventre sa mere*. The unborn were made parties to the action in the state court below, and were parties in the N.M.S.C. and are represented by Petitioners here, as a result of the Petitioners herein Intervening below. Copy of the Motion to Intervene and Order allowing Intervention is in App. 17. Said Motion succinctly sets out the defenses of invalidity and unconstitutionality. The unborn *en ventre sa mere* are represented in abortion litigation. No pregnant woman is a party. The result has been that abortions have taken place and are still occurring in violation of the rights of the unborn protected by the Fourteenth Amendment, U.S. Constitution. Said abortions are also a violation of the Federal constitution which guarantees a "Republican form of government". A Republican form of government requires Legislation rather than a Resolution of the Human Services Department, a department of the Executive branch. By order of the New Mexico Trial Court, Defendants in Intervention right to represent the cause of the unborn was acknowledged. The same is true for the Intervenor's representation of the taxpayers of New Mexico. App. 17.

The Final Order By Judge Herrera Leaves No Doubt That Abortions Pursuant To The Heim Resolution Are Authorized And That No Woman Applying For An Abortion For Medically Necessary Reasons Who Is Below The Poverty Line Can Be Denied That Taxpayer-Funded Abortion App. 61

That case is on appeal through the New Mexico Court of Appeals, in its preliminary stages. The Petition for Prohibition, filed by Petitioners in the New Mexico

Supreme Court, stress the inadequacy of appellate process because of the time consumed which is the very nature of prohibition viz that a remedy at law is inadequate. Petitioners, through their attorney, for the benefit of the unborn and the taxpayers, have continually asserted that the case should be stayed pending a final hearing in an appellate tribunal. This was denied by the New Mexico Supreme Court as part of their Order, "Petition denied." Twice in that Petition, first at pg. 5, Petitioners expressly requested a stay in these words, "a Motion for a Stay, if appropriate, on behalf of the unborn, is hereby presented as it may apply." The second request in the Petition is on pg. 15, App. 31, which says, "needless to say, this Court under Article VI, Section 3, has authority to declare a Stay and we urge this Court to do so." The Order denied both those requests by saying, Petition denied. June 21, 1995. App. 29.

Status Of Abortions In New Mexico Pursuant To Santa Fe District Court Order With Relief Denied By New Mexico Supreme Court App. 29

Information furnished to the Petitioner by a legal representative of the Human Services Department, stated that abortions are continuing with taxpayers' funding and the HSD will honor the Order of District Judge J. Herrera.

The Heim Resolution Now In Effect Works Irreparable Harm To The Unborn And The Taxpayers

Medically necessary abortions for women in a certain category are now occurring because the Heim HSD

Resolution effective Dec. 1, 1994 authorizes them at taxpayers' expense.

That in the fall of 1994, at public hearings for an HSD Resolution, authorities asserted that between 2500 and 3500 abortions would take place per year in the medically necessary category that would not take place under rape, incest and life of the mother. To allow such abortions to continue was the direct objective of Judge Herrera in nullifying the HSD Resolution, which would have become effective on May 1, 1995. Abortions funded by the taxpayers for medically necessary reasons are now going on. HSD representatives informed Petitioners that they would continue to honor Judge Herrara's Permanent Injunction. They are and will process such abortion.

The lives of the unborn are in jeopardy and will be sacrificed at the expense of the taxpayers of New Mexico and are at this very time being sacrificed. It is the lives of the unborn which are at stake and the Heim Resolution is the organ of execution.

For the above reasons, as to the unborn and also as to the taxpayers, the Injunction cannot be reversed as to those unborn who are aborted. Every hour, every day, the toll would increase. That the application of irreparable harm as is a basis for an Injunction becomes a method of execution for some of the unborn. That the 2500 to 3500 abortions under funded medically necessary abortions was based upon an estimate by HSD. App. 83.

REASONS WHY OUR PETITION SHOULD BE GRANTED

The Complaint, App. 1, shows four New Mexico doctors further identified via "discovery" as performing one hundred and fifty-three (153) of one hundred and

fifty-five (155) abortions under the *Heim Resolution* put into execution December 1, 1994, through the HSD, and three Abortion services providers, to be the only Plaintiffs. Plaintiff, NM Right to Choose, alleges itself as a "not-for-profit, statewide organization" and "as an advocacy organization" asserting "its own interests and the interests of its members who are otherwise eligible for *full coverage* or pregnancy-related services in New Mexico's Medical Assistance Program", shortened to MAD to describe various aspects of the same program which is a *Medicaid program*, which is in New Mexico a joint federal-state program. The first paragraph of *Harris v. McRae*, 448 U.S. 297, 65 L.Ed.2d 784, 100 S.Ct. 2671, states, "This case presents statutory and constitutional questions concerning the public funding of abortions under Title XIX of the Social Security Act, commonly known as the 'Medicaid' Act, and recent annual Appropriations Acts containing the so-called 'Hyde Amendment'." One of the stated grounds for U.S. Supreme Court jurisdiction under 28 U.S.C. § 1257 is State litigation claiming invalidity of a Congressional act. Every allegation in our case is within the ambit of the Medicaid Act, e.g. pg. 3 of the Complaint "the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions," and on and on throughout the Complaint. See Par 6, App. 1, which identifies the Defendant as Secretary of New Mexico HSD and says she "is sued in her official capacity". The Complaint continues by saying the Secretary of Human Services has the responsibility for administering, and for adopting and implementing regulations necessary to administer, the

New Mexico Medical Assistance Program. New Mexico Stat. Ann. §§ 27-1-2, 27-1-3 (Repl. Pampl. 1992). Present Secretary, Danfelser, and her predecessor, Heim, have no authority relative to the allegations of the Complaint except what has been conferred upon them by law. The only law is the Medicaid Program identified in Par 12, pg. 6 of the App. 1 as 42 U.S.C.A. §§ 1396a(a)(10), 1396d(a) (West Supp. 1993). Paragraph 14 under "Factual Allegations" of the Complaint refers to the *Hyde Amendment.* Petitioners claim and which Paragraph concludes, "States remain free, however, to include abortions among those services reimbursed with state funds," which is apparently state funds. The foregoing statement is the only allegation which would remove the Complaint from the adverse ruling in *Harris v. McRae.* This "States remain free" is disputed herein by the Intervenors on behalf of the unborn and the taxpayers of New Mexico. We say that the Complaint in its entirety goes against the decision in *Harris v. McRae* and is an attempt to overturn it at the state level, because the machinery for the Medicaid Act is used as the basis for the Complaint and the place under which forbidden acts under *Harris,* namely abortions "medically necessary", would be processed. Everything about the operation of the Medicaid joint federal-state program is used except a joint federal-state payment and the reasons for the abortions which Medicaid defines as rape, incest, and the life of the mother. The Complaint uses the Medicaid Act as the basis for its entire processing of the claimed abortions including all the facilities to set up solely under the joint federal-state Medicaid Act. It amounts to a New Mexico state attempted amending of a Congressional act, the *Hyde Amendment.* States do not "remain free" to use the machinery in processing set up

by the state of New Mexico in conjunction with the federal government as a means whereby *Harris* is nullified. The HSD of New Mexico has no authority to make resolutions relative to abortions except under the Medicaid Act which stems from state approval and participation in the Social Security Act. The Enabling Act of New Mexico is in App. 72 and provides for the supremacy of the federal government. As stated above, the allegations of the Complaint show almost line-by-line reference to the Medicaid Act and the machinery set up therein. Reference is made to App. 55 where the December 1, 1994, HSD regulation, known as the *Heim Resolution*, is set out. Also, the resolution known as the *Danfelser Resolution*, App. 73, is set out in the Human Services Register Said *Heim Resolution* is contended herein as being unconstitutional in violation of the Medicaid Act as decided in *Harris supra*. Plaintiffs' prayer for relief in each of its four paragraphs refers to MAD Reg. 766 and each of the four calls for changes in the MAD Program which is the name given to the New Mexico participation in the Medicaid Program as amended by the *Hyde Amendment* and each is an unconstitutional attempt in violation of Federal supremacy as stated in the Enabling Act of New Mexico. App. 72. The State of New Mexico wanted to join the Federal Union and still does. Plaintiffs' prayer for relief, pg. 14, App. 1, requests a Declaration that the "Medicaid coverage" of the *Danfelser Resolution* in New Mexico's Medical Assistance Program should be enjoined as unconstitutional under the New Mexico Constitution. An Injunction, Temporary and Permanent, took place. The Supreme Court of New Mexico denied two different Petitions, one after the Temporary Injunction and one after a Permanent Injunction from the bench, App. 29.

Presumably, the freedom to use the Medicaid Program and machinery for the *Heim Resolution* was the same as claimed in the Complaint. The same Constitutional Argument that the HSD never had any authority to be the Administrative Department for abortions except as provided for in the *Hyde Amendment* and as decided in the *Harris* case applies to the *Heim Resolution* equally to the Complaint and Injunctions issuing therefrom. The Supreme Court of New Mexico denying relief under its Art. VI, § 3, leaves the unborn *en ventre sa mere* and the taxpayers exposed to abortions pursuant to the execution of the *Heim Resolution,* now the ongoing law affecting the Petitioners herein.

ARGUMENT

Plaintiffs in the cause in the State Court of Santa Fe County, New Mexico, are four abortion doctors, residents of New Mexico, who have performed 153 of the 155 abortions since December 1, 1994, until around May 1, 1995, under the Heim Resolution. These abortions are for medically necessary reasons and were performed under "color of law" by virtue of the Injunction issued at the District Court level, first the Temporary Injunction of May 1, 1995, and then a Permanent Injunction decreed from the bench on June 5, 1995. In order to qualify under the statute which is New Mexico's participation in Title XIX of the Social Security Act, commonly known as Medicaid, the pregnant women applying for abortions as aforesaid, must be residents of the state of New Mexico. There are no such Plaintiffs in the cause of action in Santa Fe County. The right to have an abortion at taxpayers' expense for medical reasons is not contained in any New Mexico constitutional provision or statutory. The sole

authority for abortions that have been obtained rests on the Heim Resolution, a non-legislative act of the Executive Department acting through the Human Services Department. The lawsuit in Santa Fe County wants to insulate the Heim Resolution from annulment by another HSD Resolution and does so – by alleging that the right to an abortion for pregnant persons under the poverty level and for medically necessary reasons – by applying New Mexico constitutional provisions, which they allege prevent discrimination against pregnant women seeking an abortion.

Petitioners to this Court are by Order of the Court below representing the interests of the unborn *en ventre sa mere* and taxpayers. In this Court, as in the Court below, Petitioners counter with what they claim are controlling constitutional provisions, which effectually negate and annul the constitutional provisions raised by the Plaintiffs. As the first premise we state: 1) *Roe v. Wade* constitutionally has preeminence in the field of abortion; however, in New Mexico its only effect is to prevent state interference with an American pregnant woman's abortion. Those assisting in the American woman's abortion are likewise insulated from any state interference. This insulation in New Mexico prevents the enforcement of any New Mexico criminal law against abortions. Federal supremacy on the abortion issue in New Mexico ended as stated above.

Roe v. Wade, supra, as a necessary corollary prevented protection of the unborn against an abortion and to that extent reduced the rights of the unborn under the Fourteenth Amendment, U.S. Constitution, to a secondary position, which meant a position by which they were sacrificed to the principle announced in *Roe v. Wade*.

However, New Mexico's Public Policy was not changed by *Roe v. Wade* and *Roe v. Wade* did not force it on New Mexico. So, pregnant women seeking abortions in New Mexico are free to have abortions; *however,* when abortions are sought under any other circumstances except and solely freedom from state sanctions, the immunity would banish with the result that long-standing tradition, constitutional provisions, the Treaty of Guadalupe Hidalgo, the Constitution of New Mexico, and the Enabling Act passed by Congress, become operative. Such is the situation for the Heim-HSD Resolution, which took the pregnant woman, the doctors performing an abortion, and all other persons protected from state sanctions under *Roe v. Wade* and adding especially the situation where New Mexico taxpayers are forced to pay for the same without their legislature ever having authorized the same. The result is that this whole picture of abortions under the Heim Resolution is not within *Roe v. Wade*. Petitioners claim that the Public Policy of the State of New Mexico operates when the abortion is outside the coverage of *Roe v. Wade*. The alleged constitutional violations of the Complaint do not in any way justify an abortion by the words themselves. Contrary to that, abortion is not only against the statutes of the State of New Mexico but also contrary to its constitutional provision, Art. II, Section 5, entitled "*Rights under treaty of Guadalupe Hidalgo preserved* – The rights, privileges, and immunities, civil, political and religious guaranteed to the people of New Mexico by the treaty of Guadalupe Hidalgo shall be preserved inviolate." The Treaty of Guadalupe Hidalgo, 1848, guaranteed to the persons in the occupied territory, which included New Mexico, the religious rights such as they always had. This treaty is guaranteed by the United

States Government. It cannot be doubted that an abortion or participating in an abortion was prohibited at the time the United States acquired New Mexico from Mexico.

As dominant party, the United States of America did not have to guarantee to the occupants of the conquered territory religious rights such as existed in Mexico prior to 1848. The United States of America, in its Enabling Act, declared, paragraph 2, the following fundamental condition: "And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state." Immediately following is: "First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship. . . . " The Enabling Act was an Act of Congress whereby the United States laid down the conditions which would enable New Mexico to come into the Union. As applied to the Heim Resolution, its provision that New Mexico taxpayers alone must pay for abortions of other persons not only violates the separation of powers provision requirément of a republican form of government, but also expressly violates the Enabling Act as quoted above, since a person in New Mexico is forced to pay for something which is against his conscience and his mode of religious worship. The United States government has guaranteed him or her against any such resolution. Therefore, in New Mexico, *Roe v. Wade* is limited by Treaty of Guadalupe Hidalgo, Constitution of the State of New Mexico, the Enabling Act, and the U.S. Constitution from the operation of the Heim Resolution. The Enabling Act says that this "perfect toleration of religious sentiment shall be secure," which can only mean, since the U.S. government acting through

the Congress of the United States, made the Enabling Act "irrevocable without the consent of the United States and the people of said state." This does not conflict with federal supremacy as it would be applied to *Roe v. Wade* because *Roe v. Wade* takes an individual pregnant woman and provides for her freedom to have an abortion. It becomes a matter of violation of the Treaty of Guadalupe Hidalgo, Art. II, Sec. 5, of the New Mexico Constitution, the obligations of the United States government to enforce its own Enabling Act and its own treaty obligations under Guadalupe Hidalgo. It cannot be said that the Treaty of Guadalupe Hidalgo had only limited application as to time and persons since the Enabling Act and the approval given by the United States government to the Constitution of the State of New Mexico, carried forward to this very day the provisions which first appeared in the Treaty of Guadalupe Hidalgo.

I. HEIM RESOLUTION AS GENOCIDE?

Secretary Heim as the party responsible for the HSD Resolution effective December 1, 1994 is entitled to his own defense even though the unborn and the taxpayers were denied such a right in the lower Court of Santa Fe County before Judge Herrera and before the Supreme Court of New Mexico in Prohibition Cause No. 92988 where relief was denied. On July 29, 1994 in a prebill to the publication of HSD which provided the initial notice to abortions solely at New Mexico taxpayers' expense, Heim's explanation is entitled: App. 63.

"Human Services Department Position Paper on Human Services Department's Proposed Regulation for Limited Funding of Abortion."

Secretary Richard W. Heim
July 19, 1994

We labeled the program in our Prohibition proceeding "was a government promoted program approximating genocide." We incorporate by reference our statement in the Prohibition Proceeding, pgs. 9, 10. App. 31. Proof of the above is that the State of New Mexico *is* the author of the executive Resolution known as the Heim Resolution. Secretary Heim's position can be stated as follows: "Poverty is an evil" "unwanted pregnancies are an evil" but as stated in our Prohibition "at the same time, his resolution legislates for the unborn en ventre sa mere" and provides for their extermination. Secretary Heim says "Although I personally view abortion as a tragedy, I also consider it a tragedy that twenty percent of all children in the United States live in poverty" which means poverty is bad, abortion is bad therefore I am proposing a resolution that New Mexico taxpayers pay for the abortions of the poor. In other words, abortion is the lesser of two evils and governing officials have decided in favor of taking the "poor" children out of their misery and paying for it with public funds.

Since the unborn in New Mexico are "persons" (*Salazar v. St. Vincent's Hospital* 95 N.M. 150, 619 P.2d 826), the Heim Resolution violates not only state and federal Constitutions, but is predicated upon the decision that the children of the poor are better off dead, and should never see the light of day.

We also incorporate into this Petition, pg. 13 of our Prohibition, App. 43, which shows how the Resolution

works against the Indian and Black minorities and discriminates against them as it does against the "poor." *Roe v. Wade* was not a government election. The Heim Resolution is based on doing something for poor children especially minorities by eliminating them. It coincides with a Planned Parenthood objective of population control by abortion. It is based on bureaucratic arrogance and is especially abhorrent in New Mexico whose Constitution carried the provisions of the Treaty of Guadalupe-Hidalgo into the New Mexico Constitution, Section 5 which reads "Rights under Treaty of Guadalupe-Hidalgo preserved 'rights,' privileges and immunities are and religious guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo shall be preserved inviolate." The Treaty provision Article IX first of all gives the inhabitants of New Mexico "the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution." The same paragraph continues "and in the meantime shall be maintained and protected in the free enjoyment of their liberty and properties and secured in the free exercise of their religion without reservation." The Treaty provision, App. 70, continued into the State Constitution makes the U.S. government the protector of the conquered territories up to the present day. In addition, the Enabling Act which was an Act of Congress laid down terms for the territory of New Mexico's admission to the union, App. 72. Section 9 says "and said convention shall provide by ordinance irrevocable without the consent of the United States and the people of said state. First, that perfect toleration of religious sentiment shall be secured and that no inhabitant of said state shall be molested in person or property on account of his or her mode of religious worship." These

were conditions laid down by the Congress of the United States and were incorporated into the Constitution of New Mexico which specifically carried forward the Treaty obligation. New Mexico recognized the Treaty but now the Petitioners call upon the federal government to honor its part of the Treaty and the provisions of the Enabling Act and protect the unborn and the taxpayers from State of New Mexico Executives. *The ordinance is irrevocable without the consent of the United States and the people and State.* The Treaty and Enabling Act and the Constitution *could not be revoked* by an unconstitutional Executive Resolution. New Mexico obeys Federal Supremacy in *Roe v. Wade,* supra, which at the same time recognizes her "toleration and calls upon the federal government on the behalf of the unborn en ventre sa mere and the taxpayers to protect them from the Executive Heim Resolution. When New Mexico taxpayers are forced to pay for abortions, Art. II, § 5 of New Mexico's Constitution is violated.

HUMAN SERVICES DEPARTMENT

Position Paper on Human Services Department's Proposed Regulations for Limited Funding of Abortions Secretary Richard W. Heim

July 29, 1994

Today I am announcing regulations proposed by the Human Services Department concerning the funding of abortions. The regulations the department proposes do not provide for blanket state funding of abortion. The complexities involved in the alternative we propose require that I present a rationale for our decisions. I

should like to share both the factors we had to face and the values we sought to realize.

Abortion is the most divisive, explosive, and politically sensitive issue since slavery and the Civil War. This conflict has no territorial framework but rather an ideological one. Small wonder government officials are reluctant to take forthright stands on this issue.

As for myself, my "demographic profile" makes me an unlikely candidate for recommending funding *any* alternative to the birthing process: a Catholic with 10 children and 25 grandchildren! But I am also a public servant and I not only respect the law of the land but also have taken an oath to uphold it. That land (the United States of America) has determined the legality of abortion by way of the Supreme Court ruling in *Roe v. Wade,* a ruling unlikely to be modified or overturned anytime soon.

Although I personally view abortion as a tragedy, I also consider it a tragedy that 20 percent of all children in the United States live in poverty. I have met with and respect the sincerity and convictions of both right-to-life and pro-choice people and I champion their constitutional right to advocate their respective causes. I am doubtless not alone in being disturbed by extremists' activities in both camps.

Let me describe the proposed regulations and then present the multiple factors that go into the history of funding the termination of pregnancies as part of New Mexico's Medicaid program.

The Main Provisions and the Premises of the Proposed Regulations

1. Accompanying the abortion issue is the growing problem of unwanted pregnancies. Using the an-ounce-of-prevention principle, New Mexico state government is concentrating on the prevention of unwanted pregnancies by:

- expanding family-playing services to all women whose income is at or below 185 percent of the federal poverty guidelines, and
- carrying out Gov. King's directive to collaborate with the departments of Health, Children, Youth and Families, and Education on a comprehensive educational campaign targeted to adolescents.

2. Our second premise is this: if women have the right to choose, they should also have the opportunity to make an *informed* choice. Medicaid, therefore, will pay for both pre- and post-decision, voluntary counseling.

3. Medicaid will pay for abortions that are medically necessary as has been defined in a number of court-sanctioned statutes and regulations in other states, specifically where the physical or mental health of the patient warrants the procedure.

4. The Human Services Department will require the patient to sign an informed-consent document developed by the department.

5. Parental or guardian consent will be required for unemancipated minors with alternative procedures for minors who cannot communicate with parent(s) or guardian(s).

History and Rationale for the Change in Regulations

The primary impetus for the change in regulations arises from a proposed lawsuit challenging the New Mexico constitutionality of the current non-funding of abortions, a lawsuit, which if litigated and lost by the state, would require the state to pay court costs and the lawyers' fees of the involved parties.

The Attorney General and Human Services Department attorneys have concluded that the state could not win such a suit. I will try to give you a brief analysis of the events that support their conclusion and support the direction of change embodied in these proposed regulations.

Two hallowed legal principles underlie most of the decisions concerning abortion and its regulation, the due-process clause and the equal-protection-of-the-laws requirement. These are embodied in the Fourteenth Amendment to the U.S. Constitution and made applicable to the states. Many states not only have similar stipulations in their constitutions but also, and crucially, have added phrases that enhance the federal provisions.

In *Roe v. Wade,* the right of privacy and, hence, the right of procreative choice lay in the constitutional right of liberty. As a result of this ruling, state Medicaid programs were required to pay for abortions for eligible women. The Hyde Amendment approved by Congress in 1978 prohibited federal funding for abortions except when the life of the mother was endangered (and recently amended to include rape and incest) but left Medicaid funding of abortions optional with the states, providing no federal funds were used. This law was tested and upheld in 1980 in *Harris v. McRae,* in which the U.S.

Supreme Court declared that a woman's right to terminate pregnancy did not entitle her to federal resources to pay for the procedure.

Since then, state laws and regulations forbidding Medicaid payments were challenged at the state level. Most recently, the Supreme Court in Idaho ruled that, while the *Harris v. McRae*, ruling did not have to be followed by states, because of "additional and separate" provisions in Idaho's constitution, once any pregnancy-related services were extended by the state, the equal-protection clause of the state constitution required that aid be applied in a neutral manner without arbitrary discrimination.

Thus the state cannot justify paying birthing expenses for poor women while simultaneously withholding payment for medically necessary abortions for them. In the Idaho case, this resulted in the court ruling that Idaho's prohibition of funding for abortions was unconstitutional principally because of the equal-protection amendment.

The issues are narrowed in a manner best summarized by a West Virginia ruling, which stated in part:

> "The constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice form discriminatory governmental treatment."

In New Mexico terms, that means the current proposal to remove the prohibition against funding abortion while at the same time setting appropriate limits to the payment process is within the current legal analysis embodied in states' supreme court rulings, which analysis applies by extension to the New Mexico Constitution. (Attached are texts of the Fourteenth Amendment to

the U.S. Constitution and those sections of the New Mexico Constitution that have almost the exact wordings of the "additional and separate" provisions cited in the opinions of various state courts.)

As I stated earlier, this is a most sensitive issue about which sincere people will take opposing sides. This issue will continue to be debated in our national and state legislatures and courts. Given the current legislative and judicial interpretation of the will of the people in our democratic society, I believe the proposed regulations we are releasing today are an attempt to respond positively to the requirements of New Mexico's constitution; that is, to allow equitable treatment to women eligible to participate in the state's Medicaid program.

A public hearing on these proposed regulations will be held 9 a.m. September 1 at the state Capitol. Written comments received no later than 5 p.m. on September 1, as well as the verbal testimony at the public hearing, will be considered in drafting the final regulations.

II. THE ATTORNEY GENERAL

Since the Attorney General actually participated in the District Court hearing, he supported the usurpation of power of the Legislature by the Executive Branch of the New Mexico State government. How can he do this? He can hardly say that "women" exercising their "hoped for" constitutional rights influenced him because the lawsuit he actively entered was by four New Mexico abortionist doctors, who had performed 150 of the 153 abortions, performed under the unconstitutional Executive HSD Resolution named after the then Secretary, The Heim Plan.

The Attorney General is not denominated as an endorser in App. 52 but he is in the HSD Publication of the same date, and signed by the Secretary of the HSD Richard W. Heim attached in App. 65 which says on pg. 3, "The Attorney General and Human Services Attorney have concluded that the state could not win such a suit. I will try to give you a brief analysis of the events that support their conclusion." Heim goes on to state what the Attorney General and House Counsel legally concluded. Can it be doubted the the Attorney General's endorsement is a proximate cause of the HSD Resolution which four months later became the HSD Resolution which started the abortions at taxpayers' expense and which by the time the Attorney General testified on April 27, 1995 had already caused more than 150 taxpayer paid abortions? The July 29, 1994 estimate and the July 29, 1995 Position Paper both in the App. 63 and 83 show that certain unnamed people identified as "a coalition of civil and abortion rights groups had threatened to sue the State on the grounds the restrictions on Medicaid paid abortions meant poor women were denied equal access to health care as provided for under the State Constitution." Does "a coalition of civil and abortion rights groups" amend the constitution of the State of New Mexico government which is constitutionally established on the "separation of powers", with the legislature as the body to say who shall be deprived of life and who shall pay for it? Does an unidentified activist "group" amend the Fourteenth Amendment of the U.S. Constitution, which says "due process for anyone to be deprived of *life, liberty or property*?"

Does not *Beal v. Doe*, supra, and *Harris v. McRae*, supra, say that if abortions are going to take place with

public funding, that it must be by "The democratic process"? When the Attorney General and the chief executive get together to push an Executive Order ending human life with taxpayers' money *how* can that be "democratic process"? We have brought this before the New Mexico Courts at the trial level in Santa Fe County *and* the Supreme Court of New Mexico. Since The Supreme Court denial said that they had *considered* our Petition and the *Joint* Response by the Plaintiffs and the current Human Service Department. On January 1, 1995, the administration changed and we had a replacement of the executive who authored the Heim Resolution. The Joint Response of Plaintiffs and current HSD shows that the current HSD joined forces with the Plaintiffs abortionists to oppose a Stay which would save the lives of some of the unborn and taxpayers' money.

III. SOVEREIGN IMMUNITY V. THE COMPLAINT

The issues raised in the Petition for Prohibition are that the original suit below conflicts with the "sovereign immunity" doctrine of New Mexico, which is incorporated herein. It would have made the Plaintiffs' case void for lack of jurisdiction. *CBS v. Davis*, 114 S.Ct. 912 (1994), says the decision on a stay depends on whether the person will suffer irreparable harm if the stay is denied and secondly, it depends on whether the person requesting the stay for a possible chance to win the lawsuit for which the stay is requested. This is completely fulfilled here. Deaths are irreversible, payment of taxpayer funds are non-recoverable, and the doctors have no standing to sue anyway. We have attached as an exhibit the opinion by J. Herrera in giving a Temporary Injunction. To him, it is like looking into a "crystal ball" with no "crystal ball"

so he says he decides for the Plaintiffs. Of course, there are no New Mexico Constitutional precedents as he admits. All that was contained within our Petition for Prohibition below. Prohibition is a jurisdictional writ. If four abortion doctors and three abortion providers can file a lawsuit in New Mexico asking for an injunction based on a declaratory judgment that New Mexico's Constitution would find some discrimination of women then the doctrine of "soverign immunity" is dead and the sovereignty of New Mexico is destroyed. Anyone can sue and claim the Constitution gives this Constitutional right. Years ago the New Mexico Supreme Court interpreted that declaratory judgment in the light of sovereign immunity held for the sovereign immunity. This was argued in open court with J. Herrera and his response, "what is a woman to do if she has a claim which she predicts will be a constitutional violation." Our response was: *that* theory of government puts the government at the whim of anyone of its citizens. Litigation would be extensive. This brings us full circle to our often repeated objection to the Heim Resolution: the Legislature must act. *Arnold v. State,* 48 N.M. 596, 155 P.2d 257.

IV. THE ERRONEOUS BASIS FOR THE PERMANENT INJUNCTION BY STATE COURT OF NEW MEXICO

This basis, decreed in the State Court of Santa Fe County, is carried into the New Mexico Supreme Court by our Petition for Prohibition in Cause 22988 and where the denial of our Petition thereby approved the lower Court ruling. App. 76 the trial judge in his verbal opinion of June 5, 1995, granting a Permanent Injunction based his Decree upon a violation a women's rights under the

Equal Protection Section of the New Mexico Constitution, Art. II § 18, and also the Equal Rights Amendment to the New Mexico Constitution. These decisive comments in effect say that the constitutional provisions he invokes for women are completely superior to the Separation of Powers Doctrine and states it does not make any difference whether the statement which authorizes abortions for medically necessary reasons and at taxpayers' expense comes "from the legislature or from the executive." His exact words are on pg. 79 of the transcript, "I believe that in enacting the equal rights amendment in the State of New Mexico the citizens have spoken, Mr. Klecan, and they have indicated that legislation, be it by the executive or the legislative branch of government, should be gender neutral." Judge Herrera's rationale was that his interpretation of New Mexico constitutional provisions, none of which ever mentioned the right of abortion, was on a superior constitutional plane than *anything else*. His statement, "be it by the executive or legislative branch of the government," shows his thinking that women's rights as he interpreted them overcame the separation of powers provisions of the New Mexico Constitution, which incidentally was guaranteed by the Federal Constitution, Art. IV § 4 and by the Enabling Act, June 20, 1910, 36 Statutes at Large 557, Ch. 310, by which the territory of New Mexico entered the Union contains an absolute requirement that New Mexico must have a Constitution which provides for "a republican form of government." "Separation of powers" is New Mexico's fulfillment of federal demands to enter the Union. The Heim Resolution, which has already caused 155 abortions for medical reasons at New Mexico taxpayers' expense, offends all the foregoing constitutional protections for the

people of the state of New Mexico, which includes the unborn who are persons in New Mexico by *Salazar v. St. Vincent's Hospital,* 95 N.M. 150, 619 P.2d 826, which holds that the New Mexico Legislature intended viable fetus to be included in the word "person" in the wrongful death statutes. "See headnote 4 in foregoing case."

The remark by Judge Herrera showed indifference to whether the funding of medically necessary abortions by the State of New Mexico came as a result of a statute or a resolution. Obviously, it came as a Resolution. A copy of the Resolution, which expanded Medicaid coverage for medically necessary reasons for women beneath the poverty line, funded at state expense, is attached as App. 55, see pgs. 2 and 3, § 766.3, subsections 1, 2, 3, and 4, especially subsection 4, pg. 3. Section 766, Services to Terminate Pregnancy, provides for payment of abortions allowed by paragraph 4 above and means payment by New Mexico taxpayers, which has never been authorized by the Legislature nor have the abortions allowed under paragraph 4 above, ever been legislated by the New Mexico Legislature and have been excluded by *Harris v. McRae,* supra. The Heim Resolution and its ongoing application in New Mexico by virtue of the Permanent Injunction decreed from the bench June 5, 1995, in these words by J. Herrera, pg. 78, transcript, *"However, the application for permanent injunction will be granted"* (italics added). The HSD Resolution, invalidated by the permanent injunctions of June 5, 1995 is in App. 73.

The Heim Resolution Effective December 1, 1994 means abortions in New Mexico are of a continuing occurrence right now, and are irreversible obviously, the same is true of the ongoing expenditure of taxpayers' funds which are non-recoverable. The ongoing events of

abortion and use of taxpayers' funds is a direct conflict with the decision of this court in *Harris v. McRae*, supra, which ruled that Title XIX as amended by the Hyde Amendment does not allow the expenditure of taxpayers' funds under the Medicaid Act for "medically necessary reasons." The instant case in the State of New Mexico is in direct opposition because the state's "freedom" to do otherwise expressed in *Harris*, supra, is dependent upon the "democratic process" by the people's representatives" as decreed in a footnote at 97 S.Ct. 2366 in *Beal v. Doe*. Department Act through the Human Services Department for which there is no Legislative authority in the Act by which the Legislature created the Human Services Department, Art. VIII §§ 9-8-1 to 9-8-12 NMSA 1978. Abortion is never mentioned nor is there any authority in New Mexico's Public Assistance Act, 27-2-1 to 27-2-47 NMSA 1978, which is New Mexico's participation in the Joint Federal Medicaid Program.

We conclude.

New Mexico Does Not "Remain Free"
Without "Democratic Process"

Respectfully submitted,

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EXHIBIT 1

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(c)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant.

COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

I.

JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief brought pursuant to N.M. Stat. Ann. § 44-6-1 to § 44-6-15 (Repl. Pampl. 1978), the New Mexico Declaratory Judgment Act. An actual controversy exists between the parties because the New Mexico Human Services Department has promulgated a regulation, scheduled to

take effect May 1, 1995, that violates Plaintiffs' state constitutional rights. The regulation prohibits Medicaid funding of all abortions except those necessary because the pregnancy is life-threatening or results from rape or incest. Final Regulation Governing Pregnancy Termination Procedures, N.M. Human Serv. Reg., April 18, 1995 (to be codified as Regulation 766) ["the challenged regulation"]. Medicaid-eligible women who carry to term will continue to receive coverage for pregnancy-related care when medically necessary.

2. The Medical Assistant Program's discriminatory funding scheme burdens the exercise of the rights of privacy, reproductive choice, equality, and health, in violation of the New Mexico Constitution. N.M. Const. art. II, §§ 4 (inherent rights), 18 (due process, equal protection, equal rights amendment).

3. Jurisdiction is conferred on this Court by N.M. Const. art. VI, § 13; N.M. Stat. An § 38-3-1.1 (Cum. Supp. 1994); § 44-6-2 (Repl. Pamp. 1978). Venue is proper in this judicial district pursuant to N.M. Stat. Ann. § 38-3-1(G) (Cum. Supp. 1994).

II.

PARTIES

A. Plaintiffs

4. Plaintiff New Mexico Right to Choose/NARAL (NM Right to Choose), located in Bernalillo County, New Mexico, is a not-for-profit, statewide organization dedicated to preserving and promoting the right of reproductive choice in New Mexico. NM Right to Choose has

among its members women of childbearing age who are eligible for medical assistance and who may during the pendency of this lawsuit seek medically necessary abortions. In this action, NM Right to Choose asserts its own interest as an advocacy organization and the interests of its members who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

5. Plaintiff Abortion & Reproductive Health Services (ARHS) is a nonprofit reproductive health care facility in Albuquerque, New Mexico, that provides reproductive health services, including abortion. Many of ARHS' patients who seek abortions are eligible or certified for Medicaid. ARHS on occasion waives or reduces its fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, ARHS asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

6. Plaintiff Planned Parenthood of the Rio Grande (PPRG) is a new Mexico nonprofit corporation. PPRG operates two reproductive health care facilities in Albuquerque, New Mexico, a reproductive health care facility in Santa Fe, New Mexico, and an education and referral office in Taos, New Mexico. Although PPRG does not provide abortions, it offers counseling and referral on pregnancy options, including prenatal care, adoption,

and abortion. The majority of PPRG's clients are eligible or certified for Medicaid. PPRG loans funds to women who need but cannot afford abortions, including those denied state assistance. In this action, PPRG asserts its own interests and the interests of its patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

7. Plaintiff Curtis Boyd, M.D., is a physician providing reproductive health services, including abortion, in his private practice in Albuquerque, New Mexico. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Boyd on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Boyd asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

8. Plaintiff Lucia Cies, M.D., is a physician providing reproductive health care services, including abortion, in her family practice in Santa Fe, New Mexico. Many of her patients who seek abortions are eligible or certified for Medicaid. Dr. Cies on occasion waives or reduces her fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Cies asserts her own interests and the interests

of her patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

9. Plaintiff Bruce Ferguson, M.D., is a physician providing reproductive health care services, including abortion, in his private practice and at the Abortion & Reproductive health Services Clinic, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Ferguson on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Ferguson asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program, but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

10. Plaintiff Lewis Koplik, M.D., is a physician providing reproductive health care services, including abortion, in his private family practice and at Abortion and Reproductive Health Services, both of which are in Bernalillo County. Many of his patients who seek abortions are eligible or certified for Medicaid. Dr. Koplik on occasion waives or reduces his fee for women without the means to pay, most of whom have incomes below 185% of the poverty level. In this action, Dr. Koplik asserts his own interests and the interests of his patients who are otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program,

but will be denied funding for non-lifesaving but nevertheless medically necessary abortions.

B. Defendant

11. Defendant Dorothy Danfelser is the Acting Secretary of the New Mexico Human Services Department ("the Department") and is sued in her official capacity. The Secretary of Human Services has the responsibility for administering, and for adopting and implementing regulations necessary to administer, the New Mexico Medical Assistance Program. N.M. Stat. Ann. §§ 27-1-2, 27-1-3 (Repl. Pampl. 1992).

III.

FACTUAL ALLEGATIONS

12. Medicaid is a joint federal-state entitlement program that provides medical assistance to the poor. 42 U.S.C.A. §§ 1396b(a)(1), 1396d(b) (West Supp. 1993). Federal law sets out mandatory and optional categories of services funded under Medicaid. 42 U.S.C.A. §§ 1396a(a)(10), 1396d(a) (West Supp. 1993).

13. As a condition of federal participation in a state's medical assistance program, Congress mandates that each state provide pregnancy-related benefits to women with family incomes up to 133% of the federal poverty level; federal financial participation remains available for such services up to 185% of the poverty level for states that either opt or are required to fund at this higher level. 42 U.S.C.A. § 1396a(1)(2)(A)(i), (ii), (iv) (West Supp. 1993).

14. Under the Hyde Amendment, federal Medicaid funds may be used to reimburse those abortions necessary to save a woman's life or where the pregnancy results from rape or incest. Pub. L. 103-333, 108 Stat. 2539, § 509 (1994). States remain free, however, to include abortions among those services reimbursed with state funds.

15. Consistent with the federal Medicaid statute, New Mexico has chosen to provide medical assistance to needy men and women in the State. N.M. Stat. Ann. §§ 27-2-12, 27-2-9 (Cum. Supp. 1994); State of New Mexico, *Medical Assistance Division Provider Manual* (Feb. 1, 1995). Benefits include physician, hospital, laboratory, hospice, reproductive health, and midwife services, among others. State of New Mexico, *Medical Assistance Division Provider Manual*, Regs. 602, 711.33, 718.1, 721, 762.3, 763 [hereinafter "MAD Reg.(s) ___"]. Pregnancy-related care is provided to women with family incomes below 185% of the federal poverty level, and pregnant women who are eligible for the Aid to Families with Dependent Children Program ("AFDC") can receive all services covered in the Medical Assistance Program. MAD Regs. 402.24, 402.21. New Mexico provides Medicaid funding for all covered services that are medically-necessary for Medicaid-eligible men.

16. On April 18, 1995, in the absence of a statutory mandate, the Department issued the challenged regulation scheduled to take effect May 1, 1995. That regulation provides for Medicaid funding for abortions only under the following circumstances:

a. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;

b. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency; or

c. The procedure is necessary for termination of an ectopic pregnancy. MAD Reg. 766. Transportation costs and other expenses associated with a non-covered abortion are themselves non-reimbursable. MAD Reg. 605.

17. With this challenged regulation, abortions will not be funded in the Medical Assistance Program in the same manner as are other pregnancy-related services. Coverage for prenatal care, labor and delivery costs, family planning, postpartum care, emergency room services, and diagnostic procedures will continue to be provided to Medicaid-eligible pregnant women whenever medically necessary. MAD Regs. 705.1, 762.

18. The challenged regulation will repeal a regulation which became effective on December 1, 1994. The December 1, 1994 regulation expanded Medicaid coverage of abortions to circumstances where the pregnancy was the result of rape or incest, and where the abortion was "medically necessary" as defined by the regulation. MAD Reg. 766. The December 1, 1994 regulation defines medical necessity to include only those abortions necessary because "the pregnancy aggravates a pre-existing condition, makes treatment of a condition impossible, interferes with or hampers a diagnosis, or has a profound negative impact upon the physical or mental health of an individual." MAD Reg. 766.4.

19. Under the regulation, state assistance for abortions is uniquely restricted. For other covered services, the definition of medical necessity is entrusted to the physician. MAD Regs. 705.1, 711.3. The December 1, 1994 regulation also conditions medical assistance for abortions for a minor on parental consent, except in those instances in which the abortion is lifesaving, the pregnancy results from rape or incest, or a physician and independent counselor certify that the minor is sufficiently mature to make the decision in her best interest in consultation with her physician. MAD Reg. 766.63. No other service covered by the Medical Assistance Program is subject to a similar requirement.

20. Prior to the December 1, 1994 regulation, Medicaid coverage for abortion was available where the pregnancy was life-threatening or resulted from rape or incest.

21. While pregnancy carries with it health and life risks for all women, the risks are particularly significant for women with preexisting health conditions, including hypertension, heart disease, cancer, diabetes, schizophrenia, and other physical and mental health disorders. Some women develop serious health problems because of their pregnancies, including gestational diabetes, pregnancy induced hypertension, and depression. Pregnancy presents particular health risks for young women, as well as risks to the physical and mental health of women in myriad other circumstances.

22. The challenged regulation will force physicians in New Mexico, when treating low-income pregnant women with these and other health problems, either to

perform medically indicated abortions for free, which many physicians cannot afford to do on any consistent basis, or to wait, closely monitoring the patient's deteriorating health, until she delivers or the pregnancy becomes life-threatening so that an abortion is reimbursable.

23. Access to an abortion provider is a problem for many medicaid-eligible women in New Mexico, as abortions are performed in few counties. Without state assistance most Medicaid-eligible women have great difficulty paying for abortions, transportation and other related expenses. With the challenged regulation, Medicaid-eligible women will be forced to delay the procedure as they attempt to raise the money. Although abortion is safer than childbirth, the health risks associated with abortion increase significantly with delay.

24. Under the challenged regulation, many Medicaid-eligible women seeking abortions will be forced to carry pregnancies to term or pursue alternatives to legal abortion to end their pregnancies. Many will suffer foreseeable psychological and physical harm, as well as economic and other consequences.

25. There is no fiscal or other justification for the Defendant imposing these harms upon low-income women in New Mexico.

26. This suit is being brought by Plaintiffs against the Defendant because the Executive Branch of the State of New Nexico has refused to perform its duty to uphold the Constitution of the State of New Mexico and not to act in a manner that is unconstitutional. The Executive Branch through the Defendant has engaged in bad faith

and has willfully disregarded the constitutional rights of indigent women in the State of New Mexico.

V.

FIRST CAUSE OF ACTION: FOR VIOLATION OF THE STATE INHERENT RIGHTS CLAUSE

27. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 26 inclusive.

28. Article II, § 4 of the New Mexico Constitution provides: "All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness."

29. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' inherent and inalienable rights of life, liberty, safety, and happiness by impermissibly infringing Plaintiffs' exercise of their reproductive choice guaranteed by the inherent rights clause.

VI.

SECOND CAUSE OF ACTION: FOR VIOLATION OF THE STATE DUE PROCESS CLAUSE

30. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 29 inclusive.

31. Article II, § 18 of the New Mexico Constitution (the "due process clause") provides in relevant part: No person "shall be deprived of life, liberty or property without due process of law."

32. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates Plaintiffs' rights to privacy and reproductive choice guarantee by the state due process clause.

VII.

THIRD CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

33. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 32 inclusive.

34. Article II, § 18 of the New Mexico Constitution (the "state equal protection clause") provides in relevant part that no person "shall . . . be denied equal protection of the laws."

35. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results

from rape or incest, while providing coverage for all other medical services related to childbirth, the Defendant impermissibly discriminates between women who need medical care to carry a pregnancy to term and women who need medical care to terminate a pregnancy. This discrimination infringes a woman's fundamental right to choose whether or not to continue a pregnancy, in violation of the state equal protection clause.

VIII.

FOURTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL PROTECTION CLAUSE

36. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 35 inclusive.

37. By denying coverage for abortions necessary to preserve a woman's health, providing coverage instead only when an abortion is necessary to save a woman's life or the pregnancy is a result of rape or incest, the Defendant creates a distinction between medically necessary and lifesaving procedures that is not substantially, or even rationally, related to any important government interest, in violation of the state equal protection clause.

IX.

FIFTH CAUSE OF ACTION: FOR VIOLATION OF THE STATE EQUAL RIGHTS AMENDMENT

38. Plaintiffs reallege and incorporate herein by reference each and every allegation made in paragraphs 1 through 37 inclusive.

39. Article II, § 18 of the New Mexico Constitution (the "state equal rights amendment") provides in relevant part, "[e]quality of rights under law shall not be denied on account of the sex of any person."

40. The state equal rights amendment prohibits discrimination on the basis of sex.

41. By providing medical assistance to eligible men whenever a covered service is medically necessary while providing abortions to eligible women only when the procedure is necessary to save their lives or when the pregnancy is a result of rape or incest, the challenged regulation imposes disparately severe restrictions on women's access to medically necessary care, in violation of the state equal rights amendment.

42. By denying eligible women coverage for abortions unless the pregnancy is life-threatening or results from rape or incest, while providing coverage for all other medical services related to childbirth, the challenged regulation violates the state's equal rights amendment.

WHEREFORE, Plaintiffs respectfully request that the Court:

1) temporarily restrain Defendant to preserve the status quo, by continuing to afford state Medicaid coverage consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in New Mexico's Medical Assistance Program;

2) preliminarily enjoin Defendant to preserve the status quo, by continuing to afford state Medicaid coverage

consistent with the regulation adopted on December 1, 1994 and presently in effect, pending permanent relief ordering nondiscriminatory funding for abortion services in New Mexico's Medical Assistance Program;

3) declare that women otherwise eligible for full coverage or pregnancy-related services in New Mexico's Medical Assistance Program are entitled under the New Mexico Constitution to nondiscriminatory funding of abortion services;

4) permanently enjoin enforcement of MAD Reg. 766, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment; and

5) grant such other and further relief as the Court may deem just and proper, including costs and attorneys' fees.

Respectfully submitted,

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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant

and

EUGENE E. KLECAN and JOHN R. LINTON,

Defendants in Intervention.

MOTION FOR INTERVENTION OF RIGHT PURSUANT TO SECTION 1-024A NEW MEXICO CODE OF CIVIL PROCEDURE

(Filed April 26, 1995)

1. Eugene E. Klecan and John R. Linton are residents of Bernalillo County, New Mexico and taxpayers in the State of New Mexico, and as such claim the right of intervention because Plaintiffs' Complaint requests that certain abortions should be funded solely from taxes collected entirely from taxpayers of the State of New Mexico. Abortions, as requested by Plaintiffs' Complaint,

are to be distinguished from abortions under the Medicaid program, which is funded by payments from the federal government and the state government, and applies only to abortions for rape, incest, and the life of the mother. WHEREAS, Plaintiffs' Complaint seeks payments entirely from New Mexico tax funds and is for medically necessary abortions, which has been interpreted as abortion-on-demand for all practical purposes.

2. Defendants-in-Intervention, also claim the right of intervention to assert in defense, the rights of the unborn in New Mexico as of the present time and for those who may become en ventre sa mere during pendency of this litigation. New Mexico law establishes the unborn with certain rights. This right includes the right of due process, the most fundamental of which is the right to be heard. That the right to existence is threatened by the Complaint. The parties to the Complaint do not include any potential mother. Only those who wish to legislate for the lives of the unborn via abortions together with seeking to have those abortions paid for by the state agency through taxes from the New Mexico citizens are included within the terms of the Complaint. The rights of the unborn need to be advanced in this action and the due process clause of Article 2, Section 18 of the New Mexico Constitution is threatened.

3. New Mexico case, *Salazar v. St. Vincent's Hospital* 95 NM 150619 P2 826 (1980), holds that the New Mexico legislature intended viable fetus to be included within the word, "person," in wrongful death statute. (See Headnote 4 in foregoing case.) *Roe v. Wade* 410 US 113 35 LED 2nd 247, 93 SCT 705, does not recognize the right of anyone or any governmental body to end the life of the unborn via

the abortion route except on the decision of the pregnant mother. The doctor performing the abortion is protected because of *her* decision. Because the mother is not asserting any rights in this lawsuit, the rights of the unborn exist and need to be asserted in this lawsuit.

4. That if the rights of New Mexico taxpayers and the rights of the unborn are to be recognized, those rights must be asserted in opposition to the requested "Temporary Restraining Order," payment from taxpayers' funds immediately and also immediately authorize an abortion for "medically necessary reasons." In other words, the granting of the Temporary Restraining Order, would accomplish what is asked for as a finale of the declaratory judgment sought by the Plaintiffs. The Complaint of necessity recognizes that the declaratory judgment is an issue to be decided after a full scale hearing. To grant the Temporary Restraining Order would allow victory as if the declaratory judgment has already been granted. The lives of the unborn occurring during the period from the Temporary Restraining Order to the final declaratory judgment could not be remedied nor could the tax funds from New Mexico citizens be recovered. The foregoing constitutes a clear instance of irreparable harm to the unborn and to the property of New Mexico taxpaying residents. As stated above, whether a declaratory judgment will issue that is favorable to the Plaintiffs' claim, is, by their own pleadings, an issue to be resolved.

4. The above constitutes a reason surpassing all reasons favoring a Temporary Restraining Order because the life or death of the unborn outweighs all the other reasons. Interveners asserts that the New Mexico Constitution in its due process clause, guarantees, even to the

unborn, due process and an opportunity to be heard. Interveners claim the right of intervention in their behalf and urge the denial of the Temporary Restraining Order.

5. Accompanying this Motion to Intervene, is a responsive pleading to the Complaint. Because of the shortness of time allowed for the Hearing on the Temporary Restraining Order, much that is contained therein is also urged in opposition to the Temporary Restraining Order. Since it is only six days from the filing of the Complaint to the Hearing, adequate time for evaluating a lengthy Complaint and numerous exhibits together with legal memos, Interveners have not had the time necessary to prepare all aspects of a defense.

/s/ Eugene E. Klecan,
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FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant

and

EUGENE E. KLECAN and JOHN R. LINTON,

Defendants in Interveniton.

RESPONSIVE PLEADING TO THE COMPLAINT

1. Defendants in Intervention assert that there is no jurisdiction either as to party or subject matter which would entitle the Plaintiffs to any of the relief requested in their Complaint. Secondly, in response to Section II, Parties, Defendants in Intervention claim that there is a failure to name parties indispensable to the cause of action that they have alleged and that the parties names under their paragraph 2, are all parties claiming that they have a right to pecuniary gain that they would realize if they could obtain so-called medically necessary abortions

for others and are seeking compensation from the taxpayers of New Mexico.

2. New Mexico law does not envision an academic discussion, which does not include the real parties in interest. *Roe v. Wade* supra, also excludes, by implication, lawsuits over abortion rights pursued by parties who would like to perform abortions or counsel people to have them. *Roe v. Wade* supra was a case by an alleged pregnant mother.

3. The New Mexico Constitution, in all of its applications, cited in the complaint, and in particular Article II, Section 18, does not permit the academic settlement of disputed applications of its provisions but requires the personal assertion of any of its provisions by the persons *directly* involved. The New Mexico Constitution does not allow the assertion of constitutional rights by doctors or agencies in behalf of the person directly involved. See paragraph 32, page 11 of the Complaint for an illustration of the use of the Courts to promote abortions upon unnamed pregnant women, which is out of keeping and contrary to the very nature of constitutional rights which are personal. The use of the words "no person," means just that and excludes the use of agencies or doctors as persons asserting those rights for others.

4. That insofar as New Mexico taxpayers are concerned, Defendants in Intervention object to a Complaint by doctors who do and would like to perform more abortions, asserting legally the obligation of New Mexico taxpayers to pay for operations which they or other doctors may perform as being "medically necessary." Defendants in Intervention claim that all the Plaintiffs are

improper parties to this Cause of Action and we respectfully submit that they and the Cause of Action should be dismissed.

5. Response to paragraphs 5, 6, 7, 8 and 9, all claim violation of state constitutional rights and Defendants assert the lack of standing in the Plaintiffs to assert those rights as stated in the foregoing sections of this Response, i.e. doctors are not the proper parties to claim discrimination of a woman's fundamental right, see paragraph 35, lines 5 and 6, for violation of Constitutional law that requires constitutional violations to be personally litigated by the person adversely affected.

6. That the abortion doctor is being deprived of compensation by New Mexico Taxpayers for expanded coverage of the types of abortions and for compensation from New Mexico taxpayers is not an adequate grounds for giving said doctors a declaratory judgment on women's constitutional rights. It is highly noteworthy that the Complaint seeks a substantial enlargement of the kinds of abortions for which state payment is requested, i.e. from abortions of rape, incest, or life of the mother, the Complaint would enlarge it to all abortions being "medically necessary," which, as applied, has meant abortions-on-demand.

7. For the foregoing reasons, Plaintiffs in Intervention, on behalf of themselves as citizens and taxpayers and on behalf of the unborn, whose existence is threatened improperly, Defendants request the denial of all the relief requested by the Complaint.

8. There is attached to this Complaint, a memoranda of law dealing with the unconstitutionality of the

HSD Resolution, which went into effect December 1, 1994, which will be called the King Resolution. The Resolution to go into effect May 1, 1995, will be referred to as the Danfelser Resolution.

WHEREFORE the Defendants in Intervention request the denial of all the relief requested by the Complaint.

/s/ Eugene E. Klecan,
Eugene E. Klecan,
Intervener for himself
and as counsel for
John R. Linton
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MEMORANDUM ON THE UNCONSTITUTIONALITY OF THE DECEMBER 1, 1994 RESOLUTION hereinafter referred to as the Heim Resolution.

Plaintiffs seek to declare the Danfelser Resolution of May 1, 1995, to be void. They would then say that the Heim Resolution of December 1, 1994, would become operative and that the taxpayers of New Mexico would have to continue funding abortions for some women that are medically necessary. In effect, the Danfelser Resolution merely sets aside the Heim Resolution of December 1, 1994, and Plaintiffs claim that the Danfelser Resolution is unconstitutional and being in violation of the New

Mexico State Constitution. There are several provisions of the New Mexico Constitution cited by the Plaintiffs in support of their assertion but the principle one is the Equal Protection of the Laws Provision.

In effect, Plaintiffs are contending that the Heim Resolution is mandatory under the Constitution of New Mexico. The U.S. Supreme Court in *Roe v. Wade* supra and also *Harris v. McRae* 448 US 297, 65 Lawyers Addn 2nd 784, 100 SCRT 2671, have set the stage and formed the background of Plaintiffs' contentions. In *Harris v. McRae* supra, a federal case, the Plaintiffs asserted that under the Medicaid Act, all the states were required to "fund all medically necessary abortions even if federal reimbursement was unavailable." The foregoing is a quote from page 785 of *Harris v. McRae* in 65 Lawyers Addn 2nd. The United States Supreme Court said to that contention, "the Medicaid program did not require a state participating in the program to pay for those medically necessary abortions for which federal reimbursement was unavailable." In other words, this case has been to the Supreme Court of the United States, which denied Plaintiffs' claims there but they are sought to be reasserted here.

Although Plaintiffs urge other constitutional provisions than equal protection of the laws, the United States Supreme Court interpreted that provisions in the United States Constitution and specifically held that there was not a violation of the equal protection laws in the Fourteenth Amendment to the Federal Constitution. Plaintiffs are forced to assert that the New Mexico Constitution is broader than the Federal Constitution even though both have an Equal Protection Clause.

Everything in the Heim Resolution is expressly based on a violation of the Equal Protection Provision. Therefore, the reasons advanced by the United States Supreme Court in *Harris v. McRae* supra, apply equally as arguments for the Defendants in this case. In *Harris v. McRae* supra, the United States Supreme Court said that their decision was not binding on the states. Not because there is any difference in the wording of the two Constitutions but because State's rights permit the State Supreme Court to determine their own Equal Protection Clause. THEREFORE, the real issue in this case is the interpretation of New Mexico's Constitutional Provision. HOWEVER, there is a very applicable and we say, decisive, principle of law that distinguishes this case as filed by the Plaintiffs from the type of case that would be required in order to grant the type of relief requested by the Plaintiffs.

A very pertinent comment by the United States Supreme Court in *Harris v. McRae* supra, states that the states can determine meaning of their Equal Protection Clause or other constitutional provisions as applied to medically necessary abortions on democratic principles. The use of those words are highly important not only because United States Supreme Court said so, but because our entire procedures by which our constitutional provisions are applied, also requires it.

Defendants in Intervention contend that when the Heim Resolution became effective on December 1, 1994, it was unconstitutional because it violated what *Harris v. McRae* supra said was to be by democratic procedures. That the lives of the unborn can be terminated by an abortion for medically necessary reasons requires a legislative act by the New Mexico Legislature.

Interveners contend that it is not within the province of any executive acting through his HSD to provide for medically necessary abortions to be completely funded from taxpayers' funds in this state and without any contribution from the federal government. THEREFORE, Defendants claim that the HSD Resolution of Decembe. 1, 1994, was a USURPATION OF A LEGISLATIVE FUNCTION. It is also a violation of the fundamental principles of our government as stated in the Constitution, namely that the Government must be a Government of the People, which means a Government that is responsible by elections to the people.

Prior to December 1, 1994, no governmental body had ever contended in New Mexico that there was a right to an abortion completely funded by New Mexico taxpayers. *Roe v. Wade* supra, actually aids the Defendants in this case because it decided the right to an abortion, period; it did not decide that anyone, much less a state, had the obligation to fund it.

The basis of our argument opposes the Plaintiffs' contention because even if the Danfelser Resolution is inoperative, the Resolution of December 1, 1994, was unconstitutional and the unborn have the right to that protection as we pointed out above. The parties to this lawsuit cannot raise the constitutional right to an abortion through any persons except pregnant women.

In conclusion and in summation, *Roe v. Wade* based on an unwritten constitutional provision to the right to privacy declared women in the United States rights to an abortion for any reason. Any woman in the state of New Mexico has that right resulting from *Roe v. Wade*. We

contend that the executive branch acted through the HSD cannot provide for abortions funded from state funds. Any provision carrying those two elements must emanate from the legislature and the HSD, not being a legislative body, cannot deprive the unborn of life and make the taxpayers pay for it. We think the requirement of *Harris v. McRae*, that the states must act on democratic principles requires action by the state legislature, which is entirely lacking.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

June 21, 1995

NO. 22, 988

STATE OF NEW MEXICO, ex rel., EUGENE E. KLECAN and DONALD SCHUAERTE,

Petitioners,

vs.

HON. STEVE HERRERA, District Judge, County of Santa Fe, State of New Mexico,

Respondent,

and

DOROTHY DANSFELSER, Secretary, New Mexico Human Services Department,
Real Party in Interest.

ORDER

This matter coming on for consideration by the Court upon petition for prohibition and response thereto, and the Court having considered said petition and response and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the petition for prohibition hereby is DENIED.

App. 30

At Hearing for Permanent Injunction

June 5, 1995

* * *

However, the application for permanent injunction will be granted. I will tell you that I have not made a decision on whether or not the court will rule on two claims for relief, and that is the request for declaratory relief and the request by the state Attorney General's office that I address the

* * *

SUPREME COURT OF THE STATE OF NEW MEXICO

**STATE EX REL, EUGENE E. KLECAN,
and DONALD SCHAUERTE,**

Petitioners,

v. **NO. 22988**

**THE HONORABLE STEVE HERRERA,
DISTRICT JUDGE, COUNTY OF SANTA FE,
STATE OF NEW MEXICO**

Respondent.

**PETITION FOR PROHIBITION AND
PETITION FOR SUPERINTENDING CONTROL
AND ALL REMEDIES CONSTITUTIONALLY
PROVIDED UNDER ARTICLE VI,
SECTION 3 OF THE NEW MEXICO CONSTITUTION**

(Filed June 15, 1995)

PETITION

COMES NOW the Petitioners, Eugene E. Klecan and Donald Schauerte, and under oath depose and say that they are resident of the State of New Mexico and are intervenors in the District Court of Santa Fe County in Case #No. SF95-867(C). A Petition for Superintending Control by the New Mexico Supreme Court and/or All Remedies Constitutionally Provided involving the same lawsuit in the District Court of Santa Fe County, was filed in this Court in Cause No. 22886 on May 4, 1995. That cause was denied on May 10, 1995. The Order also said "the request for stay is DENIED AS MOOT." This Petition is not a refiling of Cause No. 22886, since at the time 22886 was filed, only a Temporary Injunction had been filed in the Court below. Now, the Hearing scheduled for

June 5, 1995, and as stated on page 5 of our Petition in 22886, has occurred. As stated on page 5 of our Petition in Cause 22886, there was this heading in bold type, THE EXISTENCE OF THE UNBORN AND THE FINANCIAL OBLIGATION OF THE TAXPAYER AND THE TAX CONSEQUENCES UNDER THE TEMPORARY INJUNCTION. All the assertions under whatever heading in our Petition in Cause 22886, are still true and are reaffirmed herein. It's only paper-consuming to expressly include those assertions in this Petition.

The entire Petition by Intervenors in Cause 22886 is attached hereto as Exhibit A. Attached to the Petition in Cause 22886 there is also a list of Exhibits on page 11 of our May 4, 1995 Petition. The actual exhibits are not attached to our Exhibit 1 merely to save accumulation of papers; however, those exhibits are part of our Petition herein for ready reference by the Court. Intervenors now refer to page 5, seven lines from the top, which says, "The only time limitation for this termination of the unborn by abortion is June 5, 1995, on which date Judge Herrera stated he would make the Temporary Injunction Permanent."

The Plaintiffs herein, four doctors and three abortion services providers are the real parties in interest as is the Defendant Dorothy Dansfelser, Secretary of the Human Services Department for the State of New Mexico. All of the above responded to the Petition filed herein on May 4, 1995, and both Dorothy Dansfelser and the Plaintiffs opposed the Motion.

STATEMENT OF THE CASE

To their Petition for Superintending Control filed May 4, 1995, Petitioners herein attached most of the pleadings below up to that point. These are referred to and attached as stated above and are a part of this Petition for Prohibition and other remedies under Article VI, Section 3. In the trial court since then, two court appearances have happened; briefly stated, the first resulted from notices of Depositions for the Plaintiffs doctors, Ferguson and Cies, and Depositions of Dorothy Dansfelser and Governor Johnson. These notices were by Intervenors attorney. As a follow-up on the above notices, Plaintiffs and Defendant Dansfelser jointly filed Motions for Protective Orders and, in addition, jointly filed a Motion to Rescind the Order whereby Klecan and Linton were allowed to Intervene as Defendants (See Exhibits attached to original Petition in this Court.)

This Motion also sought to disqualify Eugene E. Klecan as attorney for the Intervenors and was an attempt at his disqualification for this case. Klecan and Linton, through Attorney Klecan, filed a Response alleging, among other things, that Dorothy Dansfelser's attorney, Donald Bruckner, had a "conflict of interest" since he had signed practically all the pleading as Special Assistant Attorney General and had signed as such in the Petition filed in this Court on May 4, 1995. Klecan and Linton's response included a request for a dismissal without prejudice because the "conflict of interest" and related matters, including the position of the Attorney General, had effected the lawsuit and made it impossible to secure a "due process" trial in accordance with Article II, Section 18. Judge Herrera denied the Motion to Rescind the Order

of Intervention and denied the Motion to Disqualify Eugene E. Klecan as attorney. Judge Herrera granted the Motion for Protective Order and denied the Order to Declare a Dismissal Without Prejudice. That since the Order, Attorney Bruckner has stated that he was being paid by the Attorney General's office.

The third appearance in Court and the last occurred on June 5, 1995, which was the date set for a Hearing on the Merits. Two working days before June 5, 1995, Plaintiffs filed a Motion for a Summary Judgment based upon 23 instances and also filed a 70 page Memorandum Brief. Intervenors filed an objection blaming non-compliance with the rule on summary judgment and also stating that the action was barred from the instant of its filing on account of "The Sovereign Immunity Doctrine." At the opening of the hearing on June 5, 1995, the Court announced that he would hear the Plaintiffs' Motion for Summary Judgment. Defendant Dansfelser had also filed a Motion for Summary Judgment two working days prior to June 5, 1995. There was no Hearing on the Merits; the trial Judge overruled Intervenors' objections including that he lacked jurisdiction under the Sovereign Immunity Doctrine. Judge Herrera, after hearing arguments only on Summary Judgment, held that he granted a Permanent Injunction. The Order has not been entered as yet and the procedures have been described above at the beginning of this proceeding.

The question of the Attorney General's position in the case, the "conflict of interest" by Attorney Bruckner, the attempt on the part of both Plaintiffs and Attorney Bruckner or Dansfelser to disqualify Eugene E. Klecan, was the subject of Pleadings relative to those issues and

all such Pleadings will be furnished upon request. Intervenors concede that there are issues therein which seem to call for the Superintending Control of the Supreme court of New Mexico and are somewhat beyond the defense of the unborn and the taxpayers; however, they are related thereto and Intervenors did move for a dismissal without prejudice because they felt the case was out of control through no fault of theirs. The Order by Judge Herrera denying Eugene Klecan's disqualification and granting Protective Orders is attached hereto as Exhibit B. The above constitutes chronology of all Court events up to this point and seems to end trial Court procedures except for entering a Permanent Injunction, which this Petition seeks to prevent by Prohibition or in the event it has been entered to neutralize the same by an Order pursuant to Article VI, Section 2. A Motion for a stay, if appropriate, on behalf of the unborn is hereby presented as it may apply.

REASONS FOR GRANTING A WRIT AND/OR STAY AND ANY APPROPRIATE REMEDY UNDER ARTICLE VI, SECTION II

The first reason is the application of "The Doctrine of Sovereign Immunity." The instant this case was filed, there was no jurisdiction because it was a case against the state. The attached as Exhibit C, are the headnotes of *Arnold v. State* 48 NM 596, 155 P2 257. This case applied sovereign immunity under circumstances exactly similar. It was a declaratory judgment suit as is this one. The Declaratory Judgment Act then as now expressly seemed to allow a suit against a Department of the State. The *Arnold* case, supra, dealt with the exact situation as the

Declaratory Judgment Act and declared that the Sovereign Immunity Doctrine prevailed and that the State could not be sued, or any Department thereof. Therefore, jurisdiction was lacking. This fact was brought to the attention of the Court below and denied.

Another reason is:

153 OF THE 155 ABORTIONS PERFORMED UNDER THE HEIM RESOLUTION WHICH BECAME EFFECTIVE DECEMBER 1, 1994, WERE PERFORMED BY THE FOUR DOCTORS WHO ARE THE PLAINTIFFS IN THIS CASE.

The above statistics also included figures on the amount of taxpayers' money that was spent on the 155 abortions. Intervenors' first Petition to this Court stated, page 6, last paragraph, "Intervenors' below as New Mexico Taxpayers, expressly objected the Plaintiffs, and the doctors in particular, who are seeking to enhance their own private wealth, at the expense of New Mexico taxpayers. See paragraph 4 of Exhibit 3." 153 out of 155 abortions by Doctors Ferguson, Boyd, Cies, and Koplick, confirms our objections as stated in paragraph 6. But if the taxpayers suffered under the Heim program of December 1, 1994, needless to say, the unborn were much more drastically affected.

Judge Herrera did make the Injunction Permanent from the bench on June 5, 1995. June 5, 1995, had been scheduled since April 27, 1995, for a Hearing on the Merits. There was no qualification or condition attached to the Order from the bench on June 5, 1995, that would cast any doubt on the fact that the Temporary Injunction was being made Permanent and that a Final Order to that

effect would be entered. As of June 13, 1995, no Final Order has been filed, probably because Judge Herrera allowed fifteen days for the filing of requested findings. The Final Decree will be entered sometime after June 21, 1995 unless this Court acts on this Petition under the Constitutional provisions of Article VI, Section 3 of the New Mexico Constitution.

As stated on page 5, line 10, of the May 4th Petition, "Petitioners have nowhere else to go except this Court and invoke its PROTECTION." Article VI, Section 3, would of necessity include within its enumeration of extraordinary remedies, the right and obligation of the Supreme Court to Prohibit the aborting of the unborn at the instance of four New Mexico doctors who have performed 98.7% of the abortions authorized by the Heim Resolution effective December 1, 1994. This leads us into some specific instances where PROHIBITION as a Judicial prerogative has always acted historically and traditionally. Prohibition as presented in the first Petition to this Court now reaffirmed herein, to be used against the injunction to be made permanent in the near future. The arguments in the first Petition, dealing with the proper Plaintiff and Indispensable Party, and in conjunction with a violation of both *Roe v. Wade* supra and *Harris v. McRae* supra, declare that the four leading abortionists in the state seeking to increase their income are not proper parties to bring this action. If an action for abortion is to conform with *Roe v. Wade* supra, the pregnant mother must be the Plaintiff. New Mexico law on indispensable parties has said that it is so "jurisdictional" that the lack of a proper party can be raised at any time in the proceedings, even in the Appellate Court. We now return to

the fundamental stated in *Salazar v. St. Vincent's Hospital* 95 NM 150, that the unborn have rights and are persons under the New Mexico Constitution. These objections to the doctors as proper party Plaintiffs in Intervenors' Initial Motion to Intervene and in their Response to the Complaint and were vocalized in argument on April 27, 1995. Petitioners herein have cited several grounds for Prohibition which would make the action void in the Court below. That would save the lives of numerous of the unborn and the obligations of the taxpayers to pay for something which Doctors Ferguson, Cies, Boyd, Koplik have forced upon them. Prohibition is expressly covered in Article VI, Section 3.

Since lives are at stake, obviously an appeal is a grossly inadequate remedy. Petitioners now suggest that one of the grounds for the functioning of Article VI, Section 3, is stated in Ex Rel *Townsend v. Court of Appeals* 78 NM 714,28 P2 473. **WHEN THE QUESTION INVOLVED "IS OF GREAT PUBLIC INTEREST," AND "IT IS DEEMED TO BE IN THE PUBLIC INTEREST TO SETTLE THE QUESTION AT THE EARLIEST MOMENT," THIS SUPREME COURT OF NEW MEXICO HAS AUTHORITY AND JURISDICTION FROM ARTICLE VI, SECTION 3, TO ASSUME AND DECIDE IN ALL OF ITS RAMIFICATIONS," THIS ISSUE *"OF GREAT PUBLIC INTEREST."*** Abortion is an issue of great public interest at this particular time in history. There is no greater issue before the State of New Mexico than abortion at this particular time. Petitioners submit that in any event from a legal viewpoint, the lawsuit has no jurisdiction in the court below and the unborn and the taxpayers are entitled to a dismissal of that action, which

thereby relieves the unborn of the threat of death. However, without foregoing that dismissal, Article VI, Section 3, gives to the Supreme Court of New Mexico the right to assume jurisdiction over this question of great public interest. The legislature has not acted on this action. This lawsuit and its contrary rulings by the Executive Department acting through the HSD, has resulted not only in great confusion but great injustices.

The framers of our Constitution evidently foresaw that some such confusion over a matter of great interest in the state necessitated somebody to settle the issue. Settlement of issues is the particular characteristic of the Judicial Department of the government. Petitioners urge the Supreme Court of New Mexico to assume jurisdiction over this matter of great public interest; however, Petitioners assert that this particular action in the District Court of Santa Fe County and the injunction coming therefore is in all events lacking in jurisdiction and nothing could be more fundamental than jurisdiction.

And another reason is:

THE HEIM RESOLUTION IS UNCONSTITUTIONAL

Dick Heim was HSD Secretary and the promoter of the Resolution which provided abortions for "medically necessary reasons" at New Mexico taxpayers' expense for those who came within the poverty line. It has been urged and is urged again that that Resolution is unconstitutional is going beyond the Constitution delegation of powers to the Executive Branch of the government. This is the Resolution that was put into effect by the Permanent Injunction of Judge Herrera. This issue is one that could be considered by this Petitioner under Article VI,

Section 3. Prohibition is an apt judicial tool whereby the lawsuit by the four leading abortionists could be declared void and an injunction based on it is a nullity.

Exhibit 4, in our previous Petition in this Court, gave the HSD analysis of the number of abortions that would be performed during the year, which amounted to 2400 to 2500 at a cost of between $400,000 and $600,000 per year. Petitioners suggest that that type of proposed action by the HSD under Heim is a promotion of abortions and actually a government promoted program approximating genocide. It is one thing to say that a pregnant woman wanting an abortion cannot be interfered with by the states (*Roe v. Wade* supra). It is quite another thing to say that the State of New Mexico, acting through a Secretary of the HSD, a department of the Executive Branch of the government, can make effective a program which places State taxpayer's funds as a kind of invitation for women to have an abortion.

Petitioners now attach as Exhibit D, Secretary Heim's own rationale for his program which is the one now becoming effective as a result of Judge Herrera's injunction. This is entitled, "Position Paper on Human Services Department's Proposed Regulations for Limited Funding of Abortions" by Secretary Richard W. Heim, dated July 29, 1994. This HSD Heim Resolution has an essential component, that the abortions must be performed on only those women who qualify as being under the poverty line. At the same time, this Resolution legislates for the unborn *en ventra sa mere* and in effect decides for their extinction. This is a New Mexico HSD Resolution. The last paragraph of Exhibit D, when coupled with the requirement of the mother being below the poverty line,

states in effect that it is better to abort the unborn, whose mothers are below the poverty line than to protect their existence and their right to come into this world. I quote from the last paragraph on the 1st page by Mr. Heim personally: "Although I personally view abortion as a tragedy, I also consider it a tragedy that 20 percent of all children in the United States live in poverty."

Petitioners attach as Exhibit E, the Human Services Register, Vol. 17, No. 48, July 19, 1994, which is signed by Richard W. Heim, Secretary, Human Services Department. Page 1 has two significant sentences. "Prevention of unwanted pregnancies is a priority of the New Mexico Human Services Department through its Medicaid Family Planning Services." Page 1, 2nd paragraph says: "The Department of Human Services recognizes, however, that despite these efforts, unwanted pregnancies occur and that a woman's right to terminate a pregnancy is Constitutionally protected. During the past year, it was brought to the Department's attention that Medicaid eligible women are being denied coverage for pregnancy termination procedures they are otherwise legally entitled to receive, such denial in derogation of their Constitutional rights."

Secretary Heim's assertion is untrue because Medicaid eligible women are not being deprived of the Constitutional rights since they have no right to a New Mexico state-funded abortion. Therefore, Secretary Heim is guilty of making misleading statements in order to accomplish his objective of abortions for women below the poverty line at New Mexico taxpayers' expense. He says what he

would like to see happen and is enunciating false statements of law. Secretary Heim continues his legal evaluation by stating that the Attorney General says that litigation to accomplish what Secretary Heim advises would be "expensive and unsuccessful." This is the background of the HSD abortion policy once Judge Herrera knocked out the Resolution which would have voided on May 1, 1995, the Heim HSD Regulation that went into effect December 1, 1994, which brought public funding into the pockets of doctors Boyd, Cies, Ferguson, and Koplik. The Attorney General's role in the Santa Fe County case before us has the foregoing BACKGROUND. This leads us full circle as stated above to Secretary Heim's logic. First, being born in poverty is Rationale for Abortion Regulations. Secretary Heim proceeded to put into effect on December 1, 1994, his program, which should be described as *abortion as a means of population control,* such is the avowed purpose of the Plaintiff below, Planned Parenthood of America.

Page 2 of Secretary Heim's Rationale further indicates his attack upon those within the poverty guidelines and singles them out for destruction in accordance with his proposed regulations. In Paragraph denominated 1 of page 2 Secretary Heim says, "accompanying the abortion issue is the growing problem of unwanted pregnancies." Using an ounce of prevention principle, New Mexico state government is concentrating on the prevention of unwanted pregnancies; he now skips to paragraph number 2 where he says, "our second premise is this: if women had the right to choose, they should also have the opportunity to make an informed choice." We must keep

Secretary Heim's purpose in mind. He continues, "Medicaid, therefore, will pay for both pre- and post-decision voluntary counseling." The capstone occurs in paragraph 3 in these words: "Medicaid will pay for abortions that are medically necessary."

This is the program that Heim pushed through his own department. Nobody but the Secretary authored it except the Attorney General saying that anything to the contrary could not be defended. The entire exhibit is a series of legal conclusions, all of which state that a lawsuit that would be against Secretary Heim's regulation is doomed to failure. Rather than accept Secretary Heim's legal conclusions and legal analysis, we are asserting that the subject of the regulations is a matter of great public interest and should be determined in the Supreme Court of New Mexico. It is contended in this Petition that the Heim Resolution constitutes a violation of the Constitutional principle of the Equal Protection of the Laws as applied to the unborn whose mothers are below the poverty line.

It is asserted that the Heim Resolution unfairly labels unborn children of the poor but also works even more drastically against the minorities of the Black and Indian minority because the proportion of the population of New Mexico that is Black and below the poverty line is 24% of the entire Black population of New Mexico; and the percentage of the Indian population which is below the poverty level is 37% of the Indian population. Compare this with 7.5% of the Whites who are below the poverty line. It could be concluded that the Heim Resolution is racially oriented for destruction of the two minorities. The percentage of the Black population in New

Mexico is 2.11% and the Indian population is 10.4% of the total population. These figures are taken from the 1990 Census.

And another reason is:

SECRETARY HEIM'S RULINGS ON THE LAW

I quote from page 3, under the heading, HISTORY AND RATIONALE FOR THE CHANGE IN REGULATIONS:

> "The primary impetus for the change in regulations arises from a proposed lawsuit challenging the New Mexico constitutionality of the current non-funding of abortions, a lawsuit, which if litigated and lost by the state, would require the state to pay court costs and the lawyers' fees of the involved parties.
>
> The Attorney General and Human Services Department attorneys have concluded that the state could not win such a suit. I will try to give you a brief analysis of the events that support their conclusion and support the direction of change embodied in these proposed regulations."

The above quote especially about the Attorney General and attorneys from the Human Services Department, is an indication of decisions in legal matters by those not properly qualified to decide the Constitutional issues involved. Mr. Heim, at the outside of his paper, indicates that this abortion issue is a matter of public interest. He also makes some quasi-judicial assertions all in favor of aborting children of the poor. The role of the Attorney General in the lawsuit in Santa Fe District Court whereby he made a Motion to be *amicus curiae* and openly argued

at the time of the Temporary Injunction of April 27, 1995, and at the time of the Final Hearing on June 5, 1995, certainly indicated that he wants to throw the weight of his office behind the pro-abortion doctors who have just performed 153 out of 155 abortions. The Attorney General never gave an Attorney General's opinion. As stated by Judge Herrera in his remarks at the time he gave a Temporary Injunction, that the issue was a very close one on legal and Constitutional principles. Obviously, if it was a close one, the advantage should be with the opponents to abortion since the United States Supreme Court in *Harris v. McRae* supra, had declined under the U.S. Constitution to do what the Plaintiffs in the Santa Fe action wanted to do.

We have invoked the Superintending Control of the Supreme Court under Article VI, Section 3 it is possible that the Supreme Court in this case would deem it advisable to set aside the role of Mr. Heim as an authority on Constitutional Law and also consider and possibly decide some of the factors involved in the Attorney General's participation in the issues.

In concluding, it is true that life or death for the unborn is at stake. Judge Herrera's remarks on June 5th at the time he pronounced his decision, that the injunction would be made permanent, stated that he was doing so solely on his judicial authority to decide the Constitutional issue. That Constitutional issue was the rights of women under the New Mexico Constitution. I repeat, he emphasized that this was his exclusive right and participation in this lawsuit. Upon questioning from the Plaintiffs about the future course of events and the role of the HSD, he stated that he had no authority or jurisdiction to

tell the HSD what to do or not to do on this particular issue.

The above are not quotes, they are recollections of what was said together with a full knowledge of what that meant for the unborn, and especially during an appeal period. With the declared unconstitutionality of the Dansfelder Motion, the Heim Resolution would come into effect and operate just as it had from December 1, 1994, when 155 abortions took place at taxpayer's expense. This ruling on non-jurisdiction over the HSD would eliminate an Order to Stay during the appellate process. The law in New Mexico on appeals when the government is on the losing side of a Judgment or Decree based on unconstitutionality, provides for a Stay. We will provide to this Court, as soon as possible, a transcription of the closing remarks referred to above. Needless to say, this Court under Article VI, Section 3, patently has the authority to declare a stay and we urge this Court to do so.

In conclusion, we invoke Article VI, Section 3, which in reality is a Constitutional grant of supreme judicial authority in the Supreme Court of New Mexico. It also means that persons in the State of New Mexico can Petition to this Court. That does not exclude the unborn and certainly it does not exclude citizen taxpayers. We close with the stated applicability of *Salazar v. St. Vincent's Hospital* supra, which is the New Mexico case which holds the unborn to be persons.

CONFUSION CREATED BY THE NUMBER OF COUNSEL APPEARING IN SOME CAPACITY APPARENTLY FOR THE PLAINTIFFS

Confusion has been created by the number of counsel appearing apparently for the Plaintiffs in some capacity by their status as New Mexico attorneys, their status as personal signers of pleadings, their lack of identification as to who they really represent and who they really are; whether they have been admitted on Motion, no indication having been given of this to the Intervenors, and other things. Copy of one Signature page of a Pleading, by way of illustration, is attached as Exhibit F. This would appear to come under the Supreme Court's control over the practice of law and could come within the ambit of Article VI, Section 3.

Respectfully submitted,

/s/ Eugene E. Klecan
EUGENE E. KLECAN
Attorney for Plaintiffs
5613 Fair Oak Trail, NE
Albuquerque, NM 87109
(505) 821-6970
License #1418
Admitted 1953

I, Eugene E. Klecan, a Petitioner in the above cause, under oath, do state that I have read the foregoing Petition, know its contents, and verily believe them to be true.

/s/ Eugene E. Klecan
Eugene E. Klecan

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

SUBSCRIBED AND SWORN TO before me this 14th day of June, 1995 by Eugene E. Klecan.

/s/ Phyllis C. Sullivan
Notary Public

My Commission expires:

4-8-96

List of Exhibits

A. Cause #22886 – Petition with Exhibits attached.

B. Order by Judge Herrera denying Eugene E. Klecan's disqualification and granting Protective Orders.

C. Headnotes of *Arnold vs. State.*

D. Secretary Heim's report

E. Human Services Register, Vol. 17, No. 48, July 19, 1994.

F. Signature page of Pleading.

Harris v. McRae

* * *

16.[8b] A participating State is free, if it so chooses, to include in its Medicaid plan those medically necessary abortions for which federal reimbursement is unavailable. See Beal v. Doe, 432 US. at 447, 53 L Ed 2d 464, 97 S Ct 2366; Preterm, Inc. v. Dukakis, supra, at 134. We hold only that a State *need* not include such abortions in its Medicaid plan.

* * *

Beal v. Doe

Cite as 97 S.Ct 2366 (1977)

* * *

In these cases we have held merely that (i) the provisions of the Social Security Act do not require a State, as a condition of participation, to include the funding of elective abortions in its Medicaid program; and (ii) the Equal Protection Clause does not require a State that elects to fund expenses incident to childbirth also to provide funding for elective abortions. But we leave entirely free both the Federal Government and the States, through the normal process of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court.

* * *

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL; ABORTION AND REPRODUCTIVE HEALTH SERVICES; PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D.; LUCIA CIES, M.D.; BRUCE FERGUSON, M.D.; and LEWIS H. KOPLIK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant

and

EUGENE E. KLECAN and JOHN R. LINTON,

Defendants in Intervention.

ORDER

Defendants in Intervention, Eugene E. Klecan and John R. Linton, having moved for an intervention of right pursuant to New Mexico rules of civil procedure, said Motion is hereby granted.

/s/ S.J. Herrera
District Judge

[SEAL] [LOGO]

State of New Mexico
HUMAN SERVICES DEPARTMENT

HUMAN SERVICES REGISTER

[Provision for extended abortions is 766.31 – Payment from New Mexico Taxpayer is 766.3]

I. DEPARTMENT
NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT
PREGNANCY TERMINATION PROCEDURES

III. PROGRAM EFFECTED
(TITLE XIX) MEDICAID

IV. ACTION
PROPOSED REGULATIONS

V. BACKGROUND SUMMARY

Prevention of unwanted pregnancies is a priority of the New Mexico Human Services Department through its Medicaid Family Planning services as well as educational programs. Family Planning services are being expanded within Medicaid and educational outreach programs developed in conjunction with other state agencies to help insure accurate information is available to all New Mexicans regardless of age, location or financial status.

The Department of Human Services recognizes, however, that despite these efforts, unwanted pregnancies occur and that a woman's right to terminate a pregnancy is constitutionally protected. During the past year, it was

brought to the Department's attention that Medicaid eligible women are being denied coverage for pregnancy termination procedures they are otherwise legally entitled to receive, such denial in derogation of their constitutional rights. After researching the issue thoroughly and to avoid litigation that the Attorney General and the Department determined would be both expensive and unsuccessful, the Department has elected to promulgate regulations establishing the right of female Medicaid recipients to terminate a pregnancy pursuant to rules and regulations.

The proposed regulations provide that the termination procedure be "medically necessary", and that specific informed consent be given by the patient prior to the procedure. The regulations also provide for pre or post decision counseling for the patient, such counseling is paid for by Medicaid when furnished by approved providers.

VI. REGULATIONS

These regulations will supersede regulation in Section 310.0104(K) of existing regulations on Physician Services and be incorporated as § 766 of the Medicaid manual as follows:

766 SERVICES TO TERMINATE PREGNANCY

The New Mexico Medical Assistance Program (Medicaid) pays for medically necessary health services furnished to eligible recipients, including services to terminate pregnancy.

This section describes eligible providers, covered services, service limitations, and general reimbursement methodology.

766.1 Eligible Providers

Upon approval of New Mexico Medical Assistance Program Provider Participation Applications by the New Mexico Medical Assistance Division (MAD), the following providers are eligible to be reimbursed for furnishing services to terminate pregnancy and/or pre or post decision counseling or psychological services:

1. Individuals licensed as doctors of medicine or osteopathy;
2. Hospitals or clinics; and
3. Individuals licensed to furnish psychological services.

Upon enrollment, providers sign a provider contract and receive a packet of information, including Medicaid program policies, billing instructions, utilization review instructions, and other pertinent material from MAD.

766.2 Provider Responsibilities

Providers who furnish services to Medicaid recipients must comply with all specified Medicaid participation requirements. See. Section 701, General Provider Policies.

Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

Providers must maintain records which are sufficient to fully disclose the extent and nature of the services provided to recipients. See. Section 701, General Provider

Policies. The physician certification form and a copy of the signed informed consent must be attached to the Medicaid claim form.

766.3 Covered Services and Service Limitations

766.31 Coverage of Termination Procedures Medicaid covers services to terminate pregnancy under the following conditions:

1. The life of the recipient will be endangered should the pregnancy be allowed to continue, as certified by the treating physician;
2. The procedure is required to terminate a pregnancy resulting from rape or incest, as certified by the treating physician and/or the appropriate reporting agency;
3. The procedure is necessary for termination of an ectopic pregnancy; or
4. The procedure is medically necessary, which means that the treating physician certifies that in his/her best medical judgment the termination is necessary because of physical, emotional, psychological, familial, or age factors (or any combination of these) relevant to the recipient.

766.32 Pre-Decision Counseling Medicaid covers independent pre-decision counseling services furnished by an eligible Medicaid provider. Counseling services must be furnished in a neutral unbiased manner and include information about procedure alternatives and options for assistance.

766.33 Post-Decision Counseling Medicaid also covers post decision counseling services furnished by an eligible psychological service provider. See. Section 717, Psychiatric and Psychology Services.

766.4 Noncovered Services

Services to terminate pregnancy are subject to the limitations and coverage of services which exist for other Medicaid services. See. Section 602, General Noncovered Services. Medicaid does not cover the performance of elective termination procedures.

766.5 Prior Approval and Utilization Review

All Medicaid services are subject to utilization review for medical necessity and program compliance. Reviews may be performed before services are furnished, after services are furnished and before payment is made, or after payment is made. See. Section 705, Prior Approval and Utilization Review. Upon enrollment, providers receive instructions and documentation forms necessary for prior approval and claims processing.

766.51 Prior Approval Services to terminate pregnancy do not require prior approval from MAD or its designee.

766.52 Eligibility Determination Providers must verify that individuals are eligible for Medicaid at the time services are furnished and determine if Medicaid recipients have other health insurance.

766.53 Reconsideration Providers who disagree with review decisions can request a re-review and a reconsideration. See. Section 953, Reconsideration of Utilization Review Decisions.

766.6 Informed Consent

Voluntary, informed consent by the recipient must be given to the provider prior to the procedure to terminate pregnancy. Such consent is valid for thirty (30) days from the date of signature.

766.61 Required Acknowledgements In signing the consent, the recipient must acknowledge that she has received the following information:

1. Alternatives to pregnancy termination;
2. Medical procedure(s) to be used;
3. Possibility of physical and/or mental side effects from the performance of the procedure; and
4. Right to receive pre or post decision counseling services from an independent Medicaid provider.

766.62 Record Retention A dated and signed copy of the consent, with counseling referral numbers, must be given to the recipient. The provider must keep the original with the recipient's medical records.

766.63 Consent or Notification for Minors Emancipated or legally married minors may give informed consent.

Informed consent for an unemancipated minor or a minor not legally married must be dated and signed by a parent, legal guardian, or other adult acting "in local parentis" to the minor.

If the minor states that consent from a parent, guardian, or other adult acting in loco parentis is not available for personal reasons, the treating physician shall certify that

fact and refer the minor to an independent counselor who shall meet with the minor and confirm in writing to the treating physician that the minor is capable of giving informed consent.

766.7 Reimbursement

Medical providers must submit claims for reimbursement on the HCFA 1500 or UB92 claim forms or their successors, based on provider type. Certification of medical necessity, copy of the informed consent, physician certification, and any other required documentation must be submitted with the claim. See. Section 702, Billing for Medicaid Services. Instructions on documentation, billing, and claims processing are sent to approved Medicaid providers.

Reimbursement for the performance of services to terminate pregnancy is made at the lesser of the following:

1. The provider's billed charge; or

2. The MAD fee schedule for the specific service or procedure. See. Billing information in specific provider sections for the fee schedule.

(A) The provider's billed charge must be their usual and customary charge for services.

(B) "Usual and customary charge" refers to the amount which an individual provider charges the general public in the majority of cases for a specific procedure or service.

VII. EFFECTIVE DATE

The department proposed to implement these regulations effective October 1, 1994. [Changed to Dec. 1, 1994].

VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Thursday, September 1, 1994, at the State Capitol Building, (corner of Paseo de Peralta and Old Santa Fe Trail), Room 307, Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If this regulation is needed in other than printed form, or if persons interested in attending the hearing require other accommodations, please contact the Medical Assistance Division toll free 1-800-432-6217, in Santa Fe at 827-3100, or through the New Mexico Relay System, toll free 1-800-659-8331 at least ten (10) days before the hearing.

IX. ADDRESS

Interested persons may address written or recorded comments to:

Richard W. Heim, Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later than 5:00 p.m., Thursday, September 1, 1994. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

X. PUBLICATIONS

Publication of these regulations approved on July 19, 1994.

/s/ Richard W. Heim
RICHARD W. HEIM, SECRETARY
HUMAN SERVICES DEPARTMENT

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

No. SF 95-867(C)

NEW MEXICO RIGHT TO CHOOSE/NARAL, ABORTION AND REPRODUCTIVE HEALTH SERVICES, PLANNED PARENTHOOD OF THE RIO GRANDE; CURTIS BOYD, M.D., LUCIA CIES, M.D., BRUCE FERGUSON, M.D., and LEWIS H. KOPLICK, M.D.,

Plaintiffs,

v.

DOROTHY DANFELSER, Secretary of the New Mexico Human Services Department,

Defendant,

and

EUGENE J. KLECAN and JOHN R., LINTON,

Defendants in Intervention.

ORDER OF JUDGMENT

(Endorsed July 26, 1995)

Based upon the submissions and arguments of the parties, the record before the Court, and my Memorandum Opinion previously filed in this case,

IT IS ORDERED that:

1) Plaintiffs' motion for summary judgment is hereby granted;

2) Under the New Mexico Constitution women otherwise eligible for full coverage of pregnancy-related services in New Mexico's Medicaid Program are entitled to non-discriminatory funding of abortion services;

3) The Defendant, her agents and her successors in office are hereby permanently enjoined from enforcing the Final Regulation Governing Pregnancy Termination Procedures. N.M. Human Serv. Reg., Apr. 18, 1995, insofar as it denies state Medicaid coverage for medically necessary abortions or otherwise subjects abortion services to discriminatory treatment;

4) Plaintiffs' request for attorneys' fees is denied; and

5) Plaintiffs are entitled to reasonable costs and shall submit a cost bill within 20 days of this Order pursuant to LR1-307 of the First Judicial District.

/s/ STEVE HERRERA
Honorable Steve Herrera
District Court Judge

Submitted By:

/s/ Maureen A. Sanders
Maureen A. Sanders
Attorney for Plaintiffs

Approved Only as to Form:

Telephonically approved 7/24/95

/s/ _____
Don Buckner
Attorney for Defendant

Telephonically approved 7/15/95

/s/ _____
Eugene E. Klecan
Attorney for Intervenors

HUMAN SERVICES DEPARTMENT
Position Paper on Human Services Department's Proposed Regulations for Limited Funding of Abortions
Secretary Richard W. Heim
July 29, 1994

Today I am announcing regulations proposed by the Human Services Department concerning the funding of abortions. The regulations the department proposes do not provide for blanket state funding of abortion. The complexities involved in the alternative we propose require that I present a rationale for our decisions. I should like to share both the factors we had to face and the values we sought to realize.

Abortion is the most divisive, explosive, and politically sensitive issue since slavery and the Civil War. This conflict has no territorial framework but rather an ideological one. Small wonder government officials are reluctant to take forthright stands on this issue.

As for myself, my "demographic profile" makes me an unlikely candidate for recommending funding *any* alternative to the birthing process: a Catholic with 10 children and 25 grandchildren! But I am also a public servant and I not only respect the law of the land but also have taken an oath to uphold it. That land (the United States of America) has determined the legality of abortion by way of the Supreme Court ruling in Roe v. Wade, a ruling unlikely to be modified or overturned anytime soon.

Although I personally view abortion as a tragedy, I also consider it a tragedy that 20 percent of all children in the United States live in poverty. I have met with and

respect the sincerity and convictions of both right-to-life and pro-choice people and I champion their constitutional right to advocate their respective causes. I am doubtless not alone in being disturbed by extremists' activities in both camps.

Let me describe the proposed regulations and then present the multiple factors that go into the history of funding the termination of pregnancies as part of New Mexico's Medicaid program.

The Main Provisions and the Premises of the Proposed Regulations

1. Accompanying the abortion issue is the growing problem of unwanted pregnancies. Using the an-ounce-of-prevention principle, New Mexico state government is concentrating on the prevention of unwanted pregnancies by:

- expanding family-planning services to all women whose income is at or below 185 percent of the federal poverty guidelines, and
- carrying out Gov. King's directive to collaborate with the departments of Health, Children, Youth and Families, and Education on a comprehensive educational campaign targeted to adolescents.

2. Our second premise is this: if women have the right to choose, they should also have the opportunity to make an *informed* choice. Medicaid, therefore, will pay for both pre- and post-decision, voluntary counseling.

3. Medicaid will pay for abortions that are medically necessary as has been defined in a number of court-

sanctioned statutes and regulations in other states, specifically where the physical or mental health of the patient warrants the procedure.

4. The Human Services Department will require the patient to sign an informed-consent document developed by the department.

5. Parental or guardian consent will be required for unemancipated minors with alternative procedures for minors who cannot communicate with parent(s) or guardian(s).

History and Rationale for the Change in Regulations

The primary impetus for the change in regulations arises from a proposed lawsuit challenging the New Mexico constitutionality of the current non-funding of abortions, a lawsuit, which if litigated and lost by the state, would require the state to pay court costs and the lawyers' fees of the involved parties.

The Attorney General and Human Services Department attorneys have concluded that the state could not win such a suit. I will try to give you a brief analysis of the events that support their conclusion and support the direction of change embodied in these proposed regulations.

Two hallowed legal principles underlie most of the decisions concerning abortion and its regulation, the due-process clause and the equal-protection-of-the-laws requirement. These are embodied in the 14th Amendment to the U.S. Constitution and made applicable to the states. Many states not only have similar stipulations in their

constitutions but also, and crucially, have added phrases that enhance the federal provisions.

In Roe v. Wade, the right of privacy and, hence, the right of procreative choice lay in the constitutional right of liberty. As a result of this ruling, state Medicaid programs were required to pay for abortions for eligible women. The Hyde Amendment approved by Congress in 1978 prohibited federal funding for abortions except when the life of the mother was endangered (and recently amended to include rape and incest) but left Medicaid funding of abortions optional with the states, providing no federal funds were used. This law was tested and upheld in 1980 in Harris v. McCrae in which the U.S. Supreme Court declared that a woman's right to terminate pregnancy did not entitle her to federal resources to pay for the procedure.

Since then, state laws and regulations forbidding Medicaid payments were challenged at the state level. Most recently, the Supreme Court in Idaho ruled that, while the Harris v. McCrae ruling did not have to be followed by states, because of "additional and separate" provisions in Idaho's constitution, once any pregnancy-related services were extended by the state, the equal-protection clause of the state constitution required that aid be applied in a neutral manner without arbitrary discrimination.

Thus the state cannot justify paying birthing expenses for poor women while simultaneously withholding payment for medically necessary abortions for them. In the Idaho case, this resulted in the court ruling that Idaho's prohibition of funding for abortions was

unconstitutional principally because of the equal-protection amendment.

The issues are narrowed in a manner best summarized by a West Virginia ruling, which stated in part:

> "The constitutional question before us does not involve a weighing of the value of abortion as against childbirth, but instead concerns the protection of either procreative choice from discriminatory governmental treatment."

In New Mexico terms, that means the current proposal to remove the prohibition against funding abortion while at the same time setting appropriate limits to the payment process is within the current legal analysis embodied in states' supreme court rulings, which analysis applies by extension to the New Mexico Constitution. (Attached are texts of the 14th Amendment to the U.S. Constitution and those sections of the New Mexico Constitution that have almost the exact wordings of the "additional and separate" provisions cited in the opinions of various state courts.)

As I stated earlier, this is a most sensitive issue about which sincere people will take opposing sides. This issue will continue to be debated in our national and state legislatures and courts. Given the current legislative and judicial interpretation of the will of the people in our democratic society, I believe the proposed regulations we are releasing today are an attempt to respond positively to the requirements of New Mexico's Constitution; that is, to allow equitable treatment to women eligible to participate in the state's Medicaid program.

A public hearing on these proposed regulations will be held 9 a.m. September 1 at the State Capitol. Written comments received no later than 5 p.m. on September 1, as well as the verbal testimony at the public hearing, will be considered in drafting the final regulations.

TEXTS OF MOST RELEVANT U.S. AND NEW MEXICO AMENDMENTS

U.S. Constitution, Amendments, Article XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of New Mexico
Article II, Section 4:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are rights of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of seeking and obtaining safety and happiness.

Article II, Section 18:

> No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of sex of any person. [Adopted by the people November 7, 1972.]

ARTICLE 9

[How Mexicans remaining in ceded territories may become citizens of the United States.] – Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.

ARTICLE 2

§ 5. [Rights under treaty of Guadalupe Hidalgo preserved.] – The rights, privileges and immunities, civil, political and religious guaranteed to the people of New Mexico by the treaty of Guadalupe Hidalgo shall be preserved inviolate.

NEW MEXICO CONSTITUTION

ARTICLE 2

BILL OF RIGHTS

SECTION.		SECTION.	
1.	Supreme law of the land.	13.	Bail.
2.	Popular sovereignty.	14.	Indictment and information – Rights of accused.
3.	Right of self-government.	15.	Self-incrimination – Double jeopardy.
4.	Inherent rights.	16.	Treason.
5.	Rights under treaty of Guadalupe Hidalgo preserved.	17.	Freedom of speech and press – Libel.
6.	Right to bear arms.	18.	Right to life, liberty, property.
7.	Habeas corpus.	19.	Retroactive laws.
8.	Freedom of elections.	20.	Eminent domain.
9.	Military power subordinate.	21.	Imprisonment for debt.
10.	Searches and seizures.	22.	Alien land-ownership.
11.	Freedom of religion.	23.	Reserved rights.
12.	Trial by jury.		

§ 1. [Supreme law of the land.] – The state of New Mexico is an inseparable part of the federal Union, and the Constitution of the United States is the supreme law of the land.

§ 2 **ENABLING ACT**

OF CONGRESS

And said convention shall provide, by an ordinance irrevocable without the consent of the United States and the people of said state –

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said state shall ever be molested in person or property on account of his or her mode of religious worship.

New Mexico
HUMAN SERVICES DEPARTMENT

(SEAL) (LOGO)

HUMAN SERVICES REGISTER

I. DEPARTMENT
NEW MEXICO HUMAN SERVICES DEPARTMENT

II. SUBJECT
PREGNANCY TERMINATION PROCEDURES

III. PROGRAM AFFECTED
(TITLE XIX) MEDICAID

IV. ACTION
PROPOSED REGULATIONS

V. BACKGROUND SUMMARY

The New Mexico Human Services Register, Volume 17, No. 85, dated November 28, 1994, issued final regulations governing pregnancy termination procedures. These proposed regulations would revise the November 28, 1994 regulations to limit Medicaid coverage of abortions to those conditions reimbursed under federal law. They include:

1. the procedure is necessary to save the life of the mother,

2. the pregnancy is a result of rape or incest, or if not reported, the patient is not physically or emotionally able to report the incident; or

3. the procedure is necessary to terminate an ectopic pregnancy.

VI. REGULATIONS

These regulations will supersede regulations currently in section 766 Pregnancy Termination Procedures. A copy of the proposed regulations may be requested by contacting the Medical Assistance Division at 827-3100.

VII. EFFECTIVE DATE

The Department proposes to implement these regulations effective May 1, 1995.

VIII. PUBLIC HEARING

A public hearing to receive testimony on these proposed regulations will be held at 9:00 a.m., Friday, April 7, 1995 at Apodaca Hall in the PERA Building at the corner of Paseo de Peralta and Old Santa Fe Trail in Santa Fe, New Mexico. Parking accessible to persons with physical impairments will be available.

If you are a person with a disability and you require this information in an alternative format or require a special accommodation to participate in the public hearing, please contact the Department toll free at 1-800-432-6217, in Santa Fe at 827-9454, or through the New Mexico relay system, 1-800-659-8331. The Department requests at least 10 days advance notice to provide requested alternative formats and special accommodations.

IX. ADDRESS

Interested persons may address written or recorded comments to:

Eugene D. Lovato, PhD., Secretary
Human Services Department
P.O. Box 2348
Santa Fe, New Mexico 87504-2348

These comments must be received no later than 5:00 p.m., Friday, April 7, 1995. Written and recorded comments will be given the same consideration as oral comments made at the public hearing.

X. PUBLICATIONS

Publication of these regulations approved on February 20, 1995 by:

/s/ Eugene D. Lovato
EUGENE D. LOVATO,
PHD., SECRETARY
HUMAN SERVICES
DEPARTMENT 2-20-95

JUDGE HERRERA'S DECISION

JUDGE: Thank you. You may be seated. We're back in session in Santa Fe Cause SF 95-867(c). Let me state at the outset the court appreciates the able presentations of all counsel. (405)

This matter comes on before the court on an application for preliminary injunction brought by the plaintiffs. At our hearing on a temporary restraining order, the court indicated to counsel the criteria that the court understands the appellate courts would like us to consider in determining whether or not extraordinary relief should be granted. A request for preliminary injunction is extraordinary relief and it requires a showing on behalf of the plaintiffs on several factors, as indicated in the ***Wilcox v. Timberon Protective Ass'n*** case cited at 111 N.M. 478 (415)

The court has considered the factors raised in the opinion, but frankly I have found that the proverbial bottom line is a question that the court cannot shirk, and that is "Who is ultimately likely to succeed on the merits?" Indeed, if the court finds that the plaintiff is ultimately likely to succeed on the merits, the inescapable conclusion is the court must grant the preliminary injunction. If, on the other hand, the court believes that the defendants are ultimately likely to succeed on the merits, the court is bound to deny the application for preliminary injunction. For to do the opposite would be to prevent one side or the other their positions as I believe will ultimately be decided by our courts. (428)

Unfortunately, I do not have a crystal ball. I do not walk on water, and I do not have a monopoly on truth,

but it falls upon the judiciary in the finest tradition of the judiciary to determine whether or not enactments by our government entities violate the federal or state constitution. As slavery was the defining issue of another era, so too abortion has become the pivotal issue of our day. Fortunately, the fight over abortion has not converted our farm lands into battle fields, but no one can dispute the significance of the issue to our national conscience. Politicians and, yes, judges are frequently defined by the public perception of their views on their issue. Candidates for the United States Supreme Court are quizzed about their feelings on the issue. However, few jurists are ever actually called upon to rule on a case that involves abortion. (447)

As a point of departure, let me indicate that a judge is not at liberty to express his or her feelings about abortion. The function under our system of government for the judiciary is simply to determine whether or not the enactments of laws or regulations comport with the constitution. Judges cannot legislate. Judges cannot appropriate money. (456)

Under our federalist scheme, states are free to enact constitutions of their own so long as they are not inconsistent with the federal constitution. A corollary to this rule is that states may afford to its citizens greater liberties than that afforded to them under the federal constitution. As stated by our Supreme Court in *State v. Gutierrez:* "Thus, in exercising their constitutional duty to interpret the organic laws of this state, New Mexico courts independently analyze the state constitution." (467)

So it falls upon me, then, to predict whether or not the plaintiffs or the defendants will be the prevailing parties ultimately on the merits. In making that determination, I resort to two fundamental inquiries. Number one: "What is my understanding of the constitutional scheme in the state of New Mexico and the progression, or lack thereof, of the constitutional laws in the state of New Mexico?" and, secondly: "What ultimately is the trend in the state of New Mexico, and what ultimately in my opinion the Supreme Court would ultimately do with the issue?" I would hope that those are distinct issues and the prevailing party on the merits as it applies to my decision will be those same parties that will ultimately prevail in our appellate courts. To that end, I note that the New Mexico Supreme Court has historically found that the New Mexico Constitution does provide broader protections to its citizens than does the federal constitution. (490)

It is conceded that the United States Supreme Court has determined restrictions upon public funding of abortions – It is conceded that the United States Supreme Court has determined that restrictions upon public funding of abortions does not violate the United States Constitution. (495)

New Mexico is not the first case, however, to decide whether or not their state constitutions would afford to indigent women protections not afforded to them by the federal constitution. Perhaps the West Virginia court phrased the issue in its simplest terms, and I quote: (501)

> "The question before this court is not whether the state is obligated to subsidize the exercise of a woman's right to have an abortion.

> Rather, the issue presented is whether, once the state undertakes funding of medical care for the poor, which includes funding for childbirth, can the state deny funding for medically necessary abortion services? More specifically, does the limitation of funds to certain legislative specified reproductive services violate the constitutional protections afforded the indigent female citizens of this state?" (512)

I am persuaded that ultimately the plaintiffs will be the prevailing party for the following reasons: (515)

First, I am persuaded that the Equal Rights Amendment that has been enacted in the state of New Mexico by the voters of the state of New Mexico does express a clear intent that laws and regulations must be gender neutral, not only in their language, but in their application. As indicated, there is no such provision in the United States Constitution. (523)

The New Mexico Supreme Court has stated that New Mexicans "have a legally-protected interest in limiting the size of their families", and they've noted that the choice not to procreate as part of one's right of privacy has become certain to certain limitations a constitutional guarantee. It is therefore beyond dispute that women in New Mexico enjoy a fundamental right to reproductive choice based not only on the federal constitution, but more importantly for purposes here, on distinct state constitutional grounds. Our Supreme Court, for example, has found an additional basis for affording protections to New Mexico citizens under Article II, Section 4 of the state constitution. That provision goes beyond the protections afforded by the federal and state due process

clauses and "expressly guarantees the right of seeking and obtaining safety." (544)

It is clear to me that the state of New Mexico is not obligated to provide free medical care. However, having elected to establish the Medicaid program, the state cannot provide benefits to one class of its citizens and deny them to others absent a compelling state interest. Under the regulation that is proposed to go into effect on May 1st, New Mexico will not provide Medicaid benefits to those otherwise qualified women unless the pregnancy threatens the woman's life or results from rape or incest. This improper allocation of state funds imposes a discriminatory burden on the poorest [tape 4 begins] of the poor, and only affects women. Poor women across our state will be denied a fundamental right based upon government-selected criteria. Poor women will not receive appropriate medical assistance, even if the procedure is deemed to be "medically necessary" by her doctor. In denying funding to indigent women, the state of New Mexico is improperly substituting its judgment for that of the woman on an issue involving only that woman's right to medical choices. It is inconceivable to me that the people of the state of New Mexico – the same people who recently reaffirmed the rights of all of its citizens to "equality of rights under the law" – would deny to poor women basic health choices. (578)

But our analysis does not end there. The state is still free to deny a fundamental right if they can demonstrate a compelling state interest. No compelling state interest has been advanced by the state. Because the regulation in question applies to abortions, it necessarily limits the availability of medical care to women while, at the same

time, medical services provided to men are not so limited. The regulation in question necessarily discriminates on the basis of gender. Other states have recognized that regulatory schemes that classify according to pregnancy, or the capacity to become pregnant, constitute *per se* discrimination – and that's cited in the ***Colorado Civil Rights Comm'n v. Travelers Ins. Co.*** case. (598)

Finally, this court is persuaded that the passage of the Equal Rights Amendment by the voters in [tape 3 ends] New Mexico provides a distinct but equally compelling reason for striking down the regulation. As previously noted, there is no federal counterpart. As such, the citizens of this state – without judicial decree – have chosen to afford to the women of our state additional liberties under the state constitution.

NEW MEXICO HUMAN SERVICES DEPARTMENT
(SEAL) (LOGO)

P.O. Box 2348
Santa Fe, New Mexico 87504-2348

July 29, 1994 Contact: Helen Gaussoin, 827-7781
(pager 820-1081)

Medicaid Services Expanded

Women eligible for Medicaid would face fewer restrictions on abortion services under a rule change proposed by the New Mexico Human Services Department, officials announced today.

The department is proposing expanding Medicaid services to include abortions that are "medically necessary." Currently, the state only pays for an abortion when the life of the mother is in danger or if the pregnancy is the result of rape or incest.

Human Services Department Secretary Richard Heim said the state was under legal pressure to expand abortion services. A coalition of civil and abortion rights groups had threatened to sue the state on the grounds the restrictions on Medicaid-paid abortions meant poor women were denied equal access to health care as provided for under the state constitution.

Although challenges to federal restrictions on abortion services have been unsuccessful, abortion rights coalitions have won lawsuits challenging state "equal protection" clauses similar to the one in the New Mexico constitution.

Under the proposed rule, subject to a public hearing, the state Medicaid program would also pay for pre- and post-

abortion counseling and would require those under 18 to obtain parental consent before the procedure was performed. Minors who said they could not discuss an abortion with their parents would be required to undergo counseling.

The doctor would be responsible for determining if an abortion is medically necessary and may consider the mental health of the patient. The state would retroactively review cases and would refuse reimbursement in cases that failed to meet certain guidelines.

Human Services analysts anticipate the state, which now pays for a handful of abortions each year, would pay for about 2,400 to 3,500 abortions a year under the proposed regulation. That would cost the state between $400,000 and $600,000 a year.

The state gets about three-quarters of its Medicaid funding from the federal government but would have to pay for the additional abortions with state-only funds because the use of federal dollars is restricted to abortions when the mother's life is in danger and when the pregnancy is the result of rape or incest.

If the proposed regulation is adopted, New Mexico would join 13 other states that now provide broad abortion services. Eight of these states were forced to adopt the broader definition by court order. The public hearing will be held Sept. 1 at the state Capitol building.

In addition to proposing expanded abortion services, the department is also working on pregnancy prevention through expansion of Medicaid-funded family planning services and through a joint teen pregnancy prevention

campaign with the Children, Youth and Families Department, Department of Health, State Department of Education and other state agencies.

"The Mainstream of Hope"